TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 138.

J. T. SMITHERS, PLAINTIFF IN ERROR,

vs.

T. SMITH, S. A. GREER, R. C. REAGAN, ET AL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 24, 1905.

(19,943.)

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1 *Caption.*

Be it remembered, That at a term of the Circuit Court of the United States, in the Fifth Circuit thereof, and in and for the Northern District of Texas, at Fort Worth, begun and holden at Fort Worth, Texas, on the 13th day of March, A. D. 1905, and which term adjourned on the 8th day of April, A. D. 1905, the Honorable Edward R. Meek, United States District Judge for the Northern District of Texas, the following proceedings were had and the following cause came on for trial, to-wit:

No. 284. Law.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

2 *Original Petition.*

Filed September 9th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Fall Term, 1903.

To the Honorable Judge of Said Court:

The Plaintiff, T. J. Smithers, complaining of the Defendants, R. C. Reagan, T. Smith, S. A. Greer, John Deven, A. M. Monteith, W. E. Hall, George C. Pendleton, Alexander Anderson, James B. Daniels and Ella J. Daniels, who are hereinafter called Defendants, respectfully shows and makes known to the Court:

(1.) That the Plaintiff, J. T. Smithers, is a citizen of the County and State of New York and resides in said County and State; that the Defendants, R. C. Reagan, T. Smith, S. A. Greer, John Deven, reside in Floyd County, Texas, and are citizens of the State of Texas; that the Defendants A. M. Monteith, W. E. Hall and George C. Pendleton, reside in Bell County, Texas, and are citizens of the State of Texas; that the Defendants, James B. Daniels and Ella J. Daniels are residents and citizens of the State of Kentucky, and reside in the City of Covington, Ky.; that the Defendant, Alexander Anderson resides in Pike County, State of Illinois, and is a citizen of said State.

(2.) Plaintiff shows to the Court that heretofore, to-wit, on the 15th day of January, 1902, the Plaintiff was lawfully seized and possessed of those certain tracts, or parcels of land situated in Floyd County, Texas, and hereinafter described, holding the same by title in fee simple and entitled to the possession thereof, and was upon said date in lawful and undisturbed possession of said land.

That afterwards, to-wit, upon the day and year last aforesaid,

the Defendants, Reagan, Smith, Greer and Deven unlawfully entered upon said premises and dispossessed Plaintiff thereof, and have ever since said date unlawfully withheld from the Plaintiff the possession thereof to his damage $2,000.00.

That said Defendants who dispossessed Plaintiff set up some sort of paper title to the lands other than those hereinafter described by the Plaintiff, and by means of said claim wrongfully as-
3 serted some title to the land owned by the Plaintiff. That said Lands are bounded and described as follows:

First Tract: Known as Abstract No. 263, Survey No. 27, Block "G," by virtue of Certificate No. 30/371, issued to the T. & N. O. R. R. Co., and described as follows: Beginning 19 miles and 1617 vrs. North and 15 miles West from the S. E. Corner of Sec. 37, Block 28, for the I. & G. N. R. R. Co., on White River (being the section that includes Dewey's Lake), for the Southeast corner of this Survey; Thence North, 1900 vrs.; Thence West 1900 vrs.; thence East 1900 vrs.; to the beginning.

Second Tract: Known as Survey No. 91, Block "G," on the waters of White River, a tributary of the Brazos River, by virtue of Scrip. No. 734, issued to the Tyler Tap R. R. Co.; beginning at the Southeast corner of survey No. 90, Block "G," Scrip. No. 733 of this Company for the Northwest corner of this Survey; thence South 1900 vrs. 8/10 to a stake and mound for the Southwest corner of this Survey; thence East 1900 Vrs. to a stake and mound for the Southeast corner of this Survey; thence North 1900 Vrs. to a stake and mound for the Northeast corner of this Survey; Thence West 1900 Vrs. to the beginning. Said land patented to James B. Daniels, June 14, 1881.

Plaintiff shows to the Court that said two tracts of land are contiguous and adjoining, and that said Survey No. 91 adjoins on the North the said Survey No. 27; that said lands contain 1280 acres and were *e*fnced and have been for many years under fence by the Vendors of Plaintiff, that is to say, there was a fence consisting of cedar posts and barbed wire, joined the entire tract of land, being two miles long North and South and one mile wide East and West, and said fences being on the East and West sides of said tract two miles long, and North and South one mile; and that said lands are further described with reference to physical objects as follows: Beginning at the Southeast corner of said Survey No. 27 and the Northeast corner of No. 91, at a point on the East line of a fence erected by Pendleton, Monteith and Hall, Plaintiff's Vendors being at a point 9962.91 vrs. East, and 551.59
4 North of the Northwest corner of Survey No. 1, Block C, Certificate No. 139, I. & G. N. R. R. Co.; as fixed by an earth mound three feet high; thence North with said fence, which is also called the Pendleton fence, 1900 Vrs. to the Northeast corner of Survey No. 27, as fixed by said fence, being the Northeast corner of said Pendleton fence; thence West with the North line of said fence 1900 Vrs. to corner; thence South on the West line of said Section No. 27 at all points at the place where the fence erected by said Pendleton and others formerly stood, at 1900 Vrs. Southwest

corner of No. 27 at 3800 Vrs. The Southwest corner of said No. 91, and the Southwest corner of said Pendleton fence; thence East with the South line of said Pendleton fence, and the South line of said No. 91, 1900 Vrs. to the Southeast corner of said fence; thence North with said fence 1900 Vrs. to place of beginning.

Plaintiff shows that the Defendant Reagan wrongfully claims a part of said section No. 27 as being a part of a section No. 31, which he claims to own, and the Defendant, Smith wrongfully claims a part of said section No. 27 and No. 91 as being a part of section No. 28; and the Defendant, Greer, wrongfully claims a part of said section No. 91 as a part of section No. 90; and the defendant, Deven, wrongfully claims that he owns some part of the land claimed by Plaintiff herein as a part of section No. 27 and No. 91.

Plaintiff shows, that heretofore, to-wit, on the 19th day of September, 1901, the Defendant, A. M. Monteith, made, executed and delivered to this Plaintiff his deed with covenants of general warranty conveying the said survey No. 27, in consideration of the sum of $1600 paid to him by the Plaintiff; and by the terms of said deed he bound himself to warrant and forever defend the title to said 640 acres of land against every person whomsoever lawfully claiming the same or any part thereof.

That on the 19th day of Sept., 1901, the Defendants, A. M. Monteith, George C. Pendleton and W. E. Hall, made, executed and delivered to Plaintiff their deed with covenants of general warranty whereby they bound themselves, in consideration of the sum of $1600.00 paid to them by the Plaintiff, to warrant and forever defend the title to said survey No. 91, Block "G."

That heretofore, to-wit, on the 31st day of May, 1890, the Defendants, James P. Daniels and Ella J. Daniels, who then resided in the State of Kentucky, made, executed and delivered to the Defendants, A. M. Monteith, Hall and Pendleton, all and singular, said survey No. 91, in consideration of $960 to them paid by said vendees; that they bound themselves to warrant and forever defend said premises; that they were the true and lawful owners thereof, and that the title so conveyed was free, clear and unencumbered, and that they would warrant and forever defend the same against all claim or claims except taxes, after January 1st, 1890. That said purchase was made at the rate of $1.50 per acre, and said Daniels represented that said survey contained 640 acres.

That heretofore, to-wit, on the 6th day of May, 1890, the Defendant, Alexander Anderson, in consideration of the sum of $800. to him paid by A. M. Monteith, made, executed and delivered to said A. M. Monteith, a deed conveying Survey No. 27, Block "G," whereby they bound themselves to warrant and forever defend the title to said land as against any person whomsoever lawfully claiming the same or any part thereof. That said land was sold at $1.25 per acre and by the acre, and said Alexander represented that there *was* 640 acres of said land. That by the terms of each and all of said deeds, the grantors therein became liable and promised Plaintiff, and those claiming under said Deed, that they would warrant and forever defend the title to said land.

That by the acts of the defendants, Reagan, Smith Greer and Deven taking possession of said lands and dispossessing the Plaintiff thereof and claiming the same as parts of other surveys, they have put the rights of Plaintiff in jeopardy, and the defendants who have warranted said lands are required, under the terms of the covenants in their deeds, to now appear and defend this suit, as that there is danger to Plaintiff of losing said land.

6 That the covenants of warranty claimed in the deed by Anderson and that by Daniels and wife, have inured to the Plaintiff, and the Plaintiff is entitled in this suit to rely upon the same.

Plaintiff shows that the said land owned by him is of the value of $5000, and that the value of the sum or amount in controversy in this case is the sum of $5000 besides damages, that the controversy in this case is wholly between the citizens of different States.

That the defendants, Greer, Reagan, Smith and Deven have destroyed and removed a large part of the fencing and other improvements placed upon said land by the Plaintiff and those claiming under him, and have thereby injured said property in the sum of $2000.00, that said land is valuable for farming and grazing purposes, and that its rental value is the sum of $150.00 per annum; that since ejecting Plaintiff from said land, the defendants have been in exclusive possession thereof, using and enjoying the same and denying to Plaintiff any right to such possession.

Wherefore Plaintiff comes and prays that defendants be cited to answer hereto; that said warrantors be vouched in and required to take notice of this proceeding, and that they be concluded by the result of this suit; and that in the event said lands be lost to Plaintiff, either in whole or in part, that Plaintiff recover as against the said Monteith, Pendleton and Hall and against the said Daniels and wife, and Alexander Anderson the sums of money paid to them as consideration for said land, with interest thereon from the date of such conveyances respectively. He further prays for title to and possession of said land as against the said defendants, for his damages, rents and profits, all costs of suit and for general relief. He further prays that he may be awarded a writ of possession of and restored to the peaceable possession of said land; that the boundary lines of the land between Plaintiff and the defendants be established by and with reference to the fences heretofore constructed by Plaintiff and his vendors joining said sections Nos. 27 and 91, and that they have such other and further relief as they may be entitled to under the pleading and evidence in this cause.

7 MATLOCK, MILLER & DYCUS,
Attorneys for Plaintiff.

Endorsed as Follows: No. 284 Law. J. T. Smithers *et al. vs.* R. C. Reagan *et al.* Original Petition. This suit is brought as well to try title as for damages. Filed 9th day of September, 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy.

8 In the United States Circuit Court for the Northern District of Texas, at Fort Worth.

The President of the United States of America to the Marshal of the Northern District of Texas, Greeting:

You are hereby commanded to Summon R. C. Reagan, T. Smith, S. A. Greer and John Deven, a resident citizen of the County of Floyd, if to be found in your District, to be and appear before the Honorable Circuit Court of the United States, at the next regular Term thereof, to be holden for the Fifth Judicial Circuit and Northern District of Texas at the Court Room thereof, in the City of Fort Worth, on the first Monday, it being the 2nd day of November next, to answer the petition in Case No. 284, filed on the 9th day of September 1903, of J. T. Smithers, Plaintiff, against R. C. Reagan, T. Smith, S. A. Greer, John Deven, A. M. Monteith, W. E. Hall, George C. Pendleton, James B. Daniels, and Alexander Anderson, Defendants.

The nature of the Plaintiff's demand is as follows, to-wit: Trespass to try title to those certain tracts or parcels of land situated in Floyd county, Texas, known as Abstract No. 263, Survey No. 27, Block G, Cert. No. 30/371 issued to the T. & N. O. R. R. Co., and Survey No. 91, Block G, Scrip No. 734 issued to the Tyler Tap R. R. Co.; and for damages, costs of suit, &c., as is fully shown by Plaintiff's original petition, a copy of which duly certified is herewith accompanying and here referred to for a more distinct statement of the cause of action herein, of which you will serve the said R. C. Reagan, T. Smith, S. A. Greer and John Deven, also with the accompanying certified copy of said petition; and with a true copy of this Writ.

Herein Fail Not, and due return of this Writ make, on or before the 2nd day of Nov'r next, showing how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the Seal of said Circuit Court, at Fort Worth, Texas, this 23rd day of September, in the year of our Lord 1903, and of American Independence the 128th year.

J. H. FINKS,
Clerk of Said Circuit Court.
By J. B. FINKS,
Deputy Clerk.

[SEAL.]

9 [Endorsed:] No. 284. U. S. Circuit Court, Northern District of Texas, at Fort Worth. J. T. Smithers *vs.* R. C. Reagan *et al.* Citation to R. C. Reagan, T. Smith, S. A. Greer, and John Deven, Floyd County. Issued Sept. 23, 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy. Returned and filed Octo. 29, 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy.

Marshal's Return.

Received this Writ on the 29th day of September 189- and I executed the same on the 20 & 21 day of Octo. 1903, by delivering to the within named defendant T. Smith, 10 mi. South of Lockney,

S. A. Greer, 12 mi. South of Lockney, R. C. Reagan at Lockney, in person, a certified copy of the Petition in this case; also a true copy of this Writ.

John Deven not found.

GEO. H. GREEN,
U. S. Marshal, N. D. T.,
By JNO. B. GIRAND, *Deputy.*

Fee	$6.00
Mileage	....
Actual Expense	67.05
Total	$73.05
Team, 11½d	40.25
Sus., self & team	26.80
	67.05

10 In the United States Circuit Court for the Northern District of Texas, at Fort Worth.

The President of the United States of American to the Marshal of the Southern District of Illinois, Greeting:

You are hereby commanded to Summon Alexander Anderson, a resident Citizen of the County of Pike, if to be found in your District, to be and appear before the Honorable Circuit Court of the United States, at the next regular Term thereof, to be holden for the Fifth Judicial Circuit and Northern District of Texas at the Court Room thereof, in the City of Fort Worth, on the first Monday, it being the 2nd day of November next, to answer the Petition in Case No. 284, filed on the 9th day of September, 1903, of J. T. Smithers, Plaintiff, against R. C. Reagan, T. Smith, S. A. Greer, John Deven, A. M. Monteith, W. E. Hall, George C. Pendleton, James B. Daniels, Ella J. Daniels and Alexander Anderson, Defendants.

The nature of the Plaintiff's demand is as follows, to-wit: Trespass to try title to those certain tracts or parcels of land situated in Floyd county, Texas, known as Abstract No. 203, Survey No. 27, Block G, Cert. No. 30/371 issued to the T. & N. O. R. R. Co., and survey No. 91, Block G, Scrip No. 734 issued to the Tyler Tap R. R. Co.; and for damages, costs of suit, etc., as is fully shown by Plaintiff's original petition, a copy of which duly certified is herewith accompanying and here referred to for a more distinct statement of the cause of action herein, of which you will serve the said Alexander Anderson, also with the accompanying certified copy of said petition; and with a true copy of this Writ.

Herein Fail Not, and due return of this Writ make, on or before the 2nd day of Nov'r next, showing how you have executed the same.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the Seal of said Circuit

Court, at Fort Worth, Texas, this 23rd day of September, in the year of our Lord 1903, and of American Independence the 128th year.

J. H. FINKS,
Clerk of Said Circuit Court,
By J. B. FINKS,
Deputy Clerk.

[SEAL.]

11 [Endorsed:] No. 284. U. S. Circuit Court, Northern District of Texas, at Fort Worth. J. T. Smithers *vs.* R. C. Reagan *et al.* Citation to Alexander Anderson, Pike County. Issued Sept. 23, 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy. Returned and filed Nov. 6, 1903. J. H. Finks, Clerk By J. B. Finks, Deputy.

Marshal's Return.

Received this Writ on the 20th day of October, 1903, and I return the same not served, the within named Alexander Anderson not found in my district, this 31st day of October A. D. 1903.

C. P. HITCH,
U. S. Marshal, S. D. Illinois,
By E. E. WATTS, *Deputy.*

No Fees.

12 In the Circuit Court of the United States for the Northern District of Texas.

I, J. H. Finks, Clerk of the Circuit Court of the United States for the Northern District of Texas, do hereby certify that the citation shown on pages 8 and 9 of this transcript is the only one that was ever issued in this cause to be served on the defendant John Deven; and that the citation shown on pages 10 and 11 hereof is the only one that was ever issued in this cause to be served on the defendant Alexander Anderson, and that no other process was ever issued herein to said defendants or either of them, or to any officer directing service on said Deven or Anderson, and that no citation or other notice was served upon said defendants, or either of them herein; and that neither said Deven or said Anderson ever entered an appearance or answered in said cause.

In Testimony Whereof, witness my hand officially and the seal of said Circuit Court, at Fort Worth, Texas, this the 30th day of September A. D. 1905.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas., Ft. Worth.]

J. H. FINKS,
Clerk of Said Court,
By J. B. FINKS,
Deputy Clerk.

13 *Acceptance of Service by A. M. Monteith, W. E. Hall, & G. C. Pendleton.*

Filed September 16th, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Now comes the Defendants, A. M. Monteith, W. E. Hall, and George C. Pendleton, and waive the issuance and service of process herein, and agree to file their answer in this cause for the next term of this Honorable Court.

A. M. MONTEITH.
W. E. HALL.
GEO. C. PENDLETON.

Endorsed as follows: No. 284, L. J. T. Smithers *vs.* Reagan. Acceptance of Service. Filed 16th day of Sept., 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy.

14 *Answer of J. B. & Ella J. Daniels.*

Filed November 1st, 1903.

In the Circuit Court of the United States for the District of Texas, at Fort Worth. Fall Term, 1903.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Answer of James B. & Ella J. Daniels.

And the said Defendants, James B. Daniels, and Ella J. Daniels, his wife, by William Hartley Pugh their attorney, come and defend the wrong and injury, when, etc.; and say that they did not bind themselves nor either of them to warrant and forever defend the premises described in Plaintiff's petition against all claim or claims in the manner and form as the said J. T. Smithers hath above thereof complained against them; and of this they respectively put themselves upon the country and ask*s* to be hence dismissed with their costs.

WM. HARTLEY PUGH,
Attorney For JAMES B. AND
ELLA J. DANIELS.

I hereby certify that I am solicitor and of counsel for the defendants in the foregoing cause, and that in my opinion the foregoing plea is well founded in point of law.

WM. HARTLEY PUGH,
Solicitor and of Counsel for Defendants.

UNITED STATES OF AMERICA, *Southern District of Ohio:*

James B. Daniels and Ella J. Daniels each depose and say that they have each read the foregoing plea, that they are defendants named therein, that they know the contents thereof, and that the same is true as they verily believe.

J. B. DANIELS.
ELLA J. DANIELS.

Supscribed and sown to before me, this 30th day of October, A. D. 1903.

JAS. L. ADLER,
U. S. Commissioner, Southern District of Ohio.

Endorsed as follows: No. 284. United States Court, Northern District of Texas, at Fort Worth. J. T. Smithers *versus* R. C. Reagan *et al.* Answer of Jas. & Ella J. Daniels. Filed 1st day of Nov. 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy. Wm. Hartley Pugh, Solicitor and Counsel.

15 *Answer of R. C. Reagan.*

Filed November 23rd, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284. At Law.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

To the petition, R. C. Reagan avers:

I.

1. He owns in fee simple and in severalty, and has the title and possession of, the following part of the land described in the petition, namely: Beginning at the Southeast corner of section thirty-one, Block G, said corner being at a point 28 8/10 varas East of the Northeast corner of section number 28, Block G, located by virtue of certificate No. 30/371 originally granted to the T. & N. O. Ry. Co.; said beginning corner being 1900 8/10 varas East of the Northwest corner of said Section twenty-eight, (said Northwest corner being at a stake in earth mound marked by four pits 1900.8 varas East of

stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, Surveyor of Crosby Land District for Northwest corner of section Number 29, Block G, same being the Southwest corner of section 30, same block;) Thence North from said Southwest corner of section thirty-one, to the North line of section twenty-seven, as described in petition, a distance of eleven hundred, sixty-three, (1163) varas. Thence West with said North line to the Northwest corner of section twenty-seven, as described in petition, a distance of fourteen hundred, thirty-four, (1434) varas. Thence South with West line of section twenty-seven as described in petition, to its intersection with South line of section thirty-one, same being the North line of section twenty-eight, a distance of eleven Hundred, thirty-four (1134) varas. Thence East to beginning, a distance of fourteen hundred, thirty-four, (1434) varas. The land so described contains two hundred and eighty-eight and one half (288½) acres.

16 2. He has the open, visible, actual and sole possession of above described land; and has same, together with the remainder of section thirty-one, as that section is described below, inclosed by a visible and substantial fence, and so segregated and separated from the remainder of the land described in the petition.

3. For a long time next preceding the filing of the petition, he has had aforesaid title and estate in said land above described, and said possession inclosure and segregation thereof; of all of which the Plaintiff had notice long prior to filing the petition.

4. The South and East boundary lines of the land described in section one above, constitute a part of the South and East lines, respectively, of aforesaid section thirty-one, (31). Reagan has owned and held possession of section thirty-one, in severalty and in fee simple, continuously since long prior to the filing of the petition. Said section is in Floyd County, Texas, and is described by metes and bounds as follows: Beginning at a stake in earth mound marked by four pits 1900.8 varas East of stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District, for Northwest corner of survey number twenty-nine, block G, the same being the Southwest corner of section number thirty, Block G, for Southwest corner of this survey. Thence East 1900 varas to a point that constitutes the Southeast corner of the land described in section one above, for Southeast corner of this survey. Thence North passing through the Northeast corner of the land described in section one above, 1900 varas in all; Thence West 1900 varas; Thence South 1900 varas to beginning.

In claiming title and holding possession of the land described in section one above, as aforesaid, Reagan so held and claimed it, openly and notoriously, as a part of section thirty-one and *e*ith reference to, and as marked by the lines of section thirty one as above given, and not as a part of sections 27 and 91 or either of them.

Of the matters set out in this section, Plaintiff had notice long prior to the filing of the petition.

17 5. Save the land described in section one above, Reagan has not now, nor has he ever had or claimed to have, either title or

possession of the land described in the petition. Of all of which Plaintiff had notice prior to filing the petition.

6. The title of Reagan to the land described in section one above, is not derived from or through the remainder of the defendants, or any of them, or from or through any one through whom they or any of them derive title to the land claimed by them, if any, and described in the petition saving the sovereignty of the soil, the State of Texas.

7. The value of the land described in section one above, when the petition was filed, and also on January 1st, 1902, and continuously from that date to the present, was and has been less than eight hundred and sixty-six, (866.00) Dollars.

8. The value of the use of the land described in section one above, from January 1st, 1902, continuously to the present, does not exceed fifteen Dollars, ($15.00) per year.

9. The value of all improvements on the land described in section one above, or the worth to said land of such improvements, placed or owned by Plaintiff and those claiming under him, or any of them, never exceeded One Hundred, ($100.00) Dollars.

10. If the several allegations in the petition that Reagan Smith, Greer and Deven unlawfully entered upon the land therein described dispossessed Plaintiff, and have since held possession, were made as to Reagan with reference to other than the land described in section one above, they are, each of them, untrue, and if so made, Reagan avers, on information and belief, for which belief he has good cause, that each was made with intent to confer upon this Court jurisdiction over him.

11. Plaintiff's allegation that Reagan, Smith, Greer and Deven have destroyed and removed, or either a large part of the fencing and other improvements on the land described in the petition, if made as to Reagan with reference to fencing and improvements, or either, on land other than that described in section one above, is untrue, and if so made, Reagan avers, on information and belief, for which
18 belief he has good grounds that same was made with intent to confer on this Court jurisdiction over him.

If such allegations mean that such fencing and other improvements, or either, on the land described in section one above, was ever of the value, or improved said land to the amount of two thousand Dollars, such allegation is untrue, and Reagan avers, on information and belief, for which belief he has good cause, that same was made to confer on this Court jurisdiction over him.

By reason of the premises, this Court is without jurisdiction over Reagan, and he asks that the suit abate as to him, and that he be dismissed.

L. S. KINDER,
WM. BERNE,
Att'ys for R. C. Reagan.

STATE OF TEXAS, *County of Floyd:*

Before me, the undersigned authority, on this day personally appeared, R. C. Reagan, who first having been by me duly sworn, under oath says that he is a defendant in above suit, and that the foregoing plea, and the allegations made and the facts set out therein, are true in substance and in fact.

R. C. REAGAN.

Sworn to before me, and subscribed in my presence, by said R. C. Reagan, on this the 20th day of November, 1903.

ARTHUR B. DUNCAN,
[SEAL.] *County Judge, Floyd County, Texas.*

II

Not waiving foregoing plea, but relying and insisting thereon, and in event only that same be overruled, Reagan avers:

1. Save as to the land described in section two below, he has not now, nor has he ever had or claimed to have, either title or possession of the land described in the petition, or any part thereof.

2. As to the land below described in this section, he denies, all and singular, the allegations of the petition; and of this he
19 puts himself upon the country. He also denies all and singular, the allegations of the petition of damage for use of the land therein described and from conversion of improvements. And of this, he puts himself upon the country

The land mentioned above in this section is situated in Floyd County, Texas, is a part of that described in the petition, and is described as follows: Beginning at the Southeast corner of section thirty-one, Block G, said corner being at a point 28 8/10 varas East of the Northeast corner of section number twenty-eight, Block G, located by virtue of certificate No. 30/371 originally granted to the T. & N. O. Ry. Co.; said beginning corner being nineteen hundred and eight-tenths, (1900.8) varas east of the Northwest corner of said section 28, (said Northwest corner being at a stake in earth mound marked by four pits nineteen hundred and eight tenths, (1900.8) varas east of a stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District for Northwest corner of section Number twenty-nine, Block G, same being the Southwest corner of section thirty, same Block;) Thence North, from said Southeast corner of section thirty-one, to the North line of section twenty-seven, as said section twenty-seven is described in the petition, a distance of eleven Hundred, sixty-three, (1163) varas; Thence West with said North line to the Northwest corner of section twenty-seven, as said section is described in the petition, a distance of Fourteen Hundred, thirty-four, (1434) varas; Thence South with West line of section twenty-seven to its intersection with South line of section thirty-one, same being the North line of section twenty-eight, a distance of eleven hundred, sixty-three, (1163) varas; Thence East to

beginning, a distance of fourteen hundred, thirty-four, (1434) varas.

3. As to the land described in section two just above, he pleads not guilty of the wrongs and trespasses in the petition alleged; and of this, he puts himself upon the country.

Wherefore, he asks to be dismissed.

L. S. KINDER,
WM. BERNE,
Att'ys for R. C. Reagan.

20 Endorsed as follows: No. 284 at law. In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth. J. T. Smithers *vs.* R. C. Reagan *et al.* Answer of R. C. Reagan. Filed the 23rd day of March 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy.

21 *Answer of S. A. Greer.*

Filed November 23rd, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Forth Worth.

No. 284. At Law.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

I.

To the petition, S. A. Greer avers:

1. He holds possession of, adversely to Plaintiff, and claims as a purchaser immediately, without intervening conveyances, from the sovereign of the soil the State of Texas, as the assignee of R. P. Reeves, the following part of the land described in the petition, namely: Beginning at the Northwest corner of survey No. ninety, Block "G" located by virtue of certificate number 733 originally granted to the T. T. Ry. Co., and situated in Floyd County, Texas, said beginning corner being the Southeast corner of survey Number twenty-eight, Block G, and being eighteen hundred, seventy-two, (1872) varas east of the Northwest corner of said section ninety, (said Northwest corner being at a stone on the North bank of Running Water Draw, and being nineteen hundred, eight-tenths, (1900.8) varas East, and nineteen hundred, eight-tenths, (1900.8) varas South of a stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District, for Northwest corner of survey Number twenty-nine, Block G:) Thence South, from said Northeast corner of section ninety, to a point at the intersection of the South line of section ninety-one, as section ninety-one is decribed by physical objects in the Petition, a distance of seven

hundred, thirty seven, eight tenths, (737.8) varas: Thence West to the West line of the land described in the petition, being the Southwest corner of section ninety-one, as section ninety-one is described by physical objects in the petition, a distance of Thirteen Hundred and Sixteen, (1316) varas: Thence North with the West line of section ninety-one, as that section is described as aforesaid, to the intersection of said line with the North line of section
22 ninety, a distance of Seven Hundred, Thirty-seven, eight tenths, (737.8) varas: Thence East to the beginning, a distance of Thirteen hundred and Sixteen (1316) varas; containing One Hundred eight-seven and one half, (187½) acres.

2. He has the open, visible, actual and sole possession of above described land.

3. For a long time next preceding the filing of the petition, he has had aforesaid title and estate in said land above described, and said possession of the land above described: Of all of which the Plaintiff had notice long prior to filing the petition.

4. The North and East boundary lines of the land described in section one above, constitute a part of the North and East lines, respectively, of aforesaid section ninety. Greer has held possession of section ninety, in severalty, claiming as a purchaser directly and immediately from the sovereign of the soil the State of Texas, as its assignee of R. P. Reeves, continuously since long prior to the filing of the petition; said section is in Floyd County, Texas, and is described by metes and bounds as follows: Beginning at a stone on North Bank of Running Water Draw, for the Northwest corner of this survey, the said corner being nineteen hundred, eight tenths (1900.8) varas East, and nineteen hundred eight tenths (1900.8) varas South of a stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District, for Northwest corner of survey Number twenty-nine, Block G. Thence East, passing through the Northwest corner of the land described in section one above, to stone, set for the Southeast corner of a six hundred acres survey made for T. Smith out of section twenty-eight, Block G, in all eighteen hundred, seventy-two (1872) varas, for Northeast corner of this survey. Said stone is the Northeast corner of the land described in section one above. Thence South passing through the Southeast corner of the land described in section one above, to a stone on South line of Running Water Draw, in all nineteen hundred, eight tenths (1900.8) varas, for Southeast corner of this survey. Thence West eighteen hundred, seventy-two (1872) varas to
23 a stone set for Southwest corner of this survey. Thence North nineteen hundred, eight-tenths (1900.8) varas to the beginning.

In holding possession of the land described in section one above, as aforesaid, Greer so held and claimed it, openly and notoriously, as a part of section ninety and with reference to and as marked by the lines of section ninety as above given, and not as a part of sections twenty-seven and ninety-one, or either of them.

Of the matters set out in this section, Plaintiff had notice long prior to the filing of the petition.

5. Save the land described in section one above, Greer has not now, nor has he ever had or claimed to have, either title or possession of the land described in the petition. Of all of which, Plaintiff had notice prior to filing the petition.

6. The title of Greer to the land described in section one above, was obtained by him directly and immediately, with the intervening conveyance of R. P. Reeves, from the sovereign of the soil the State of Texas, as the assignee of said R. P. Reeves. Said title is not derived from or through the remainder of the defendants or any of them, or from or through any one through whom they or any of them derive title to the land claimed by them, if any, and described in the petition, save the sovereign of the soil, the State of Texas.

7. The value of the land described in section one above, when the petition was filed, and also on January 1st, 1902, and continuously from that date to the present, was and has been less than six hundred ($600.00) Dollars.

8. The value of the use of the land described in section one above, from January 1st, 1902, continuously to the present, does not exceed Ten Dollars ($10.00) per year.

9. The value of all improvements on the land described in section one above, or the worth to said land of such improvemnets placed or owned by Plaintiff and those claiming under him, or any of them, never exceed- Seventy-Five ($75.00) Dollars.

24 10. If the several allegations in the petition that Reagan, Smith, Greer and Deven unlawfully entered upon the land described therein, dispossessed Plaintiff, and have since held possession, were made as to Greer with reference to other than the land described in section one above, then they are, each of them, untrue, and Greer avers, on information and belief, for which belief he has good cause, that each was made with intent to confer on this Court jurisdiction over him.

11. Plaintiff's allegation that Reagan, Smith, Greer and Deven have destroyed and removed, or either, a large part of the fencing and other improvements on the land described in the petition, if made as to Greer with reference to fencing and improvements, or either, on land other than that described in section one above, is untrue, and if so made, Greer avers, on information and belief, for which belief he has good grounds, that same was made with intent to confer on this Court, jurisdiction over him.

If such allegations mean that such fencing and other improvements or either, on the land described in section one above was ever of the value, or improved said land to the amount of two thousand dollars, such allegation is untrue, and if so made Greer avers, on information and belief, for which belief he has good cause, that same was made to confer on this Court, jurisdiction over him. By reason of the premises, this Court is without jurisdiction over Greer, and he asks that the suit abate as to him, and that he be dismissed.

L. S. KINDER,
WM. BERNE,
Att'ys for S. A. Greer.

STATE OF TEXAS, *County of Floyd:*

Before me, the undersigned authority on this day personally appeared S. A. Greer, who, first having been by me duly sworn under oath says that he is a defendant in above suit, and that the foregoing plea, and the allegations made and facts set out therein, are true in substance and in fact.

S. A. GREER.

Sworn to before me, and subscribed in my presence, by said S. A Greer, on this, the 20th day of November, 1903.

ARTHUR B. DUNCAN,
[SEAL.] *County Judge, Floyd County, Texas.*

25 II.

Not in any wise waiving foregoing plea, but relying and insisting thereon and in event only that same be overruled, Greer avers:

1. Heretofore, on October 28th, 1901, J. T. Smithers, the Plaintiff in the case at Bar, in the District Court of the State of Texas, in and for the County of Floyd therein, in cause Number 355 in said Court, filed his petition in trespass to try title to recover of S. A. Greer, a defendant in the case at Bar, one T. Smith and others, the title and possession of the land described in the petition in the case at Bar.

To the petition, Greer filed a plea of not guilty and a cross action to recover of Smithers the title and possession of section ninety, which is described by metes and bounds below in this section: and Smith filed a plea of not guilty and a cross action to recover of Smithers section twenty-eight, which adjoins section ninety, (90) immediately on the North. Of said action and cross actions, said State Court had jurisdiction.

Said section ninety is in Block G, and was located by virtue of certificate Number 733, originally granted to the T. T. Ry. Co.; and situated in Floyd County, Texas, and more fully described as beginning at a stone on the North bank or Running Water Draw, for the Northwest corner of this survey, said corner being nineteen hundred, eight-tenths, (1900.8) varas east and nineteen hundred, eight-tenths (1900.8) varas South of a stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District for Northwest corner of *of* survey No. 29, same Block. Thence East eighteen hundred, seventy-two, (1872) varas to a stone set for the southeast corner of a six hundred acre survey made for T. Smith out of section No. 28, same Block, for Northeast corner of this survey. Thence South nineteen hundred, eight-tenths, (1900.8) varas to a stone on south side of Running Water Draw for Southeast corner of this survey. Thence West eighteen hundred, seventy-two, (1872) varas to a stone set for Southwest corner of this survey. Thence North Nineteen hundred, eight-tenths, (1900.8) varas to beginning.

26 2. On Sept. 2nd, 1902, Smithers dismissed his cause of action, and on same day filed an application and bond to re-

move to this Court aforesaid cross-actions. Thereupon such application was refused by said State Court.

3. Thereafter, and on September 3rd, 1905, Greer recovered judgment against Smithers for the title and possession of section ninety as above described, and Smith a judgment to same effect for section 28: And in the judgment writs of possession were ordered to issue to place Greer and Smith in possession of said sections, respectively.

4. On said September 3rd, after rendition of said judgment, Smithers filed a motion for new trial in said cause No. 355, same was forthwith overruled, and thereupon Smithers duly gave notice of appeal to the Court of Civil Appeals of the State of Texas for the second Supreme Judicial District.

5. On November 3rd, 1902, Smithers filed in this Court a transcript of the record in cause No. 355; and on March 16th, 1903, this Court held that it was without jurisdiction thereof and remanded the cause to the State Court.

6. On August 19th, 1903, Smithers filed in said State Court, in cause 355, his application and bond for writ of error to remove the cause to the aforesaid State Appellate Court for revision of said judgment. The application and bond were in due form, were filed in due time, and within the proper time, Smithers filed in said Appellate Court a transcript of the record in said cause No. 355. The jurisdiction of the said Appellate Court has attached to said cause, and same is now pending therein undetermined.

7. Since the rendition of the judgment in said cause No. 355, and long prior to the institution of the suit at Bar, Greer has had possession of said section ninety, under authority of and in accordance with said judgment.

8. Said section ninety includes the following part of the land described in the petition and no other part thereof, namely: Beginning at the Northeast corner of section number ninety, as above
27 described by metes and bounds, thence South to a point at the intersection of the South line of section ninety-one, as that section is described by physical objects in the petition, a distance of seven hundred, thirty-seven and eight-tenths (737.8) varas. Thence West to the West line of the land described in the petition, being the Southwest corner of section ninety-one as that section is described by physical objects in the petition, a distance of Thirteen Hundred, sixteen, (1316) varas. Thence North with the West line of section ninety-one, as that section is described as aforesaid, to the intersection of said line with the North line of section ninety as section ninety is described in this plea, a distance of seven hundred thirty-seven, eight-tenths, (737.8) varas; Thence East to the beginning, a distance of thirteen hundred, sixteen, (1316) varas.

9. In holding possession of the land described in section eight just above, as aforesaid, Greer so claimed and held it, openly and notoriously, as a part of section ninety and with reference to, and as marked by the lines of section ninety as above given, and not as a part of sections twenty-seven and ninety-one, or either of them.

Of the matters set out in this section, Plaintiff had notice long prior to filing of the petition.

10. Save the land described in section eight just above, Greer has not now, nor has he ever had or claimed to have, either title or possession of the land described in the petition. Of all of which Plaintiff had notice prior to filing the petition.

11. The several allegations in the petition in the suit at Bar that Reagan, Smith, Greer, and Deven unlawfully entered upon the land described therein, dispossessed Plaintiff, and have since held possession, if made as to Greer with reference to other than the land described in section eight above, are each of them, untrue, and if so made, Greer avers, on information and belief, for which belief he has good cause, that each was made with intent to confer on this Court jurisdiction over him.

12. Plaintiff's allegation that Reagan, Smith, Greer and Deven have destroyed and removed, or either, a large part of the fencing and other improvements on the land described in the petition, if made as to Greer with reference to fencing and improvements, or either, on land other than that described in section eight
28 above, is untrue, and if so made, Greer avers on information and belief, for which belief he has good cause, that same was made with intent to confer on this court jurisdiction over him.

If such allegations mean that such fencing and other improvements or either, on the land described in section eight above was ever of the value, or improved said land to the amount, of two thousand dollars, such allegation is untrue, and if so made, Greer avers, on information and belief, for which belief he has good cause, that same was made to confer on this Court jurisdiction over him.

And this, Greer is ready to verify. Wherefore, he prays judgment if this Court ought or will try this cause prior to the determination of said cause in the State Court.

L. S. KINDER,
WM. BERNE,
Att'ys for S. A. Greer.

STATE OF TEXAS, *County of Floyd:*

Before me, the undersigned authority, on this day personally appeared S. A. Greer, who, first having been by me duly sworn, under oath says that he is a defendant in the above suit in the Circuit Court of the United States, and that the foregoing plea, and the allegations made and facts set out therein, are true in substance and in fact.

S. A. GREER.

Sworn to before me, and subscribed in my presence, by said S. A. Greer on this the 20th day of November, 1903.

ARTHUR B. DUNCAN,
[SEAL.] *County Judge, Floyd County, Texas.*

III.

Not waiving foregoing pleas, or either of them, but relying and insisting thereon, and in event only that both be overruled, Greer avers:

1. Save as to the land described in section two below, he has not now, nor has he ever had or claimed to have, either title or possession of the land described in the petition, or any part thereof.

2. As to the land below described in this section, he denies, all and singular, the allegations of the petition; and of this, he puts himself upon the Country. He also denies all and singular, the allegations of the petition of damage for use of the land therein described, and from conversion of improvements. And of this he puts himself upon the Country.

29 The land mentioned above in this section is situated in Floyd County Texas, is a part of that described in the petition, and is described as follows: Beginning at the Northeast corner of survey number ninety, Block G, located by virtue of certificate Number 733 originally granted to the T. T. Ry. Co. and situated in Floyd County, Texas, said beginning corner being the Southeast corner of survey number twenty-eight, Block G, and being eighteen hundred, seventy-two, (1872) varas east of the Northwest corner of said section ninety, (said Northwest corner being a stone on the North bank of Running Water Draw and being nineteen hundred, eight-tenths, (1900.8) varas East, and nineteen hundred, eight-tenths (1900.8) varas south of a stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District, for Northwest corner of survey Number twenty-nine, Block (G); thence South, from said Northeast corner of section ninety, to a point at the intersection of the South line of section ninety-one, as section ninety-one is described by physical objects in the petition, a distance of seven hundred, thirty-seven, eight tenths, (737.8) varas. Thence West to the West line of the land described in the petition, being the Southwest corner of section ninety-one, as section ninety-one is described by physical objects in the petition, a distance of thirteen hundred, sixteen, (1316) varas. Thence North, with the West line of section ninety-one, as that section is described as aforesaid, to the intersection of said line with the North line of section ninety, a distance of Seven Hundred, thirty-seven, eight tenths, (737.8) varas. Thence East to the beginning, a distance of thirteen hundred sixteen, (1316) varas.

3. As to the land described in section two just above, he pleads not guilty of the wrongs and trespasses in the petition alleged. And of this he puts himself upon the Country.

Therefore he asks to be dismissed.

L. S. KINDER,
WM. BERNE,
Att'ys for S. A. Greer.

Endorsed as follows: No. 284. At Law. In the Circuit Court of the United States, for the Northern District of Texas, at Fort Worth. J. T. Smithers, *vs.* R. C. Reagan, *Et Al.* Answer of S. A. Greer. Filed 23rd day of Nov., 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy. L. S. Kinder, Wm. Berne Att'ys for Greer.

30 *Answer of T. Smith.*

Filed November 23rd, 1903.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284. At Law.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

To the Petition, T. Smith avers:

1.

1. Heretofore, on October 28th, 1901, T. J. Smithers, the Plaintiff herein, in the District Court of the State of Texas, in and for the County of Floyd in said State, in cause number 355 in said Court, filed his petition in trespass to try title to recover of T. Smith, a defendant in the case at bar, one S. A. Greer, and others, the title and possession of the land described in the petition in the case at bar.

To the petition, Smith filed a plea of not guilty and a cross action to recover of Smithers, the title and possession of section twenty-eight which is described by metes and bounds below in this section; and Greer filed a plea of not guilty and a cross action to recover of Smithers section ninety, which adjoins section twenty-eight immediately on the South. Of said action and cross actions, said State Court had jurisdiction.

Said section twenty-eight is in Block G, in said Floyd County, was located by virtue of Certificate No. 30/371 originally granted to the T. & N. O. Ry. Co.; and more fully described as beginning at a stake in earth mound marked by four pits nineteen Hundred, eight tenths (1900.8) varas East of stone set in ground marked by two pits about twenty-five varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District, for Northwest corner of survey number twenty-nine, same block, same being the Southwest corner of section number thirty, for the Northwest corner of this survey. Thence East eighteen hundred, seventy-two (1872) varas to stake and mound marked by four pits in south line of section number thirty-one (31), same block, for Northeast corner of this survey. Thence South
31 Nineteen Hundred, eight-tenths, (1900.8) varas to a stone in ground for Southeast corner of this survey. Thence West eighteen hundred, seventy-two, (1872) varas to a stone in North Bank of Running Water Draw for Southeast corner of survey number twenty nine, (29), same Block, and Southwest corner of this Survey. Thence North (1900.8) nineteen hundred, eight-tenths varas to the beginning.

2. On Sept. 2nd, 1902, Smithers dismissed his cause of action, and on same day filed an application and bond to remove to this Court aforesaid cross-actions. Thereupon such application was refused by said State Court.

3. Thereafter, and on Sept. 3rd, 1903, Smith recovered judgment against Smithers for the title and possession of section twenty-eight as above described, and Greer a judgment to same effect for section ninety; and in the judgment writs of possession were ordered to issue to place Smith and Greer in possession of said sections, respectively.

4. On said Sept. 3rd, after rendition of said judgment, Smithers filed a motion in said cause number 355 for a new trial, same was forthwith overruled, and thereupon Smithers duly gave notice of appeal to Court of Civil Appeals of the State of Texas for the Second Supreme Judicial District.

5. On November 3rd, 1902, Smithers filed in this Court a transcript of the record in cause No. 355; and on March 16th, 1903, this Court held that it was without jurisdiction thereof and remanded the cause to the State Court.

6. On August 19th, 1903, Smithers filed in said State Court, in cause No. 355, his application and bond for writ of error to remove the cause to aforesaid State Appellate Court for revision of said judgment. The application and bond were in due form, were filed in due time, and within the proper time, Smithers filed in said Appellate Court a transcript of the record in said cause No. 355. The jurisdiction of the said Appellate Court has attached to said cause, and same is now pending therein, undetermined.

7. Since the rendition of the judgment in said cause No. 355, and long prior to the institution of the suit at Bar, Smith has had possession of said section twenty-eight, under authority of
32 and in accordance with said judgment.

8. Said section twenty-eight includes the following part of the land described in the petition and no other part thereof, namely: Beginning at the Northeast corner of section twenty-eight, as it is described above, thence South nineteen hundred, eight-tenths, (1900.8) varas to Southeast corner of that section. Thence West with the South line of said section, to the intersection of said South line with the West line of section ninety-one, (91), as the latter is described by physical objects in the petition, a distance of thirteen hundred and sixteen, (1316) varas. Thence North, with the West line of section ninety-one, (91), as that section is described by physical objects in the petition, to the Northwest corner of said section; and from that corner, continuing North with the West line of section twenty-seven, (27), as the latter is described by physical objects in the petition, to the intersection of said West line with the North line of section twenty-eight, as the latter is above described, a total distance of nineteen hundred eight-tenths, (1900.8) varas. Thence East with the North line of section twenty-eight, to the beginning, a distance of thirteen hundred, sixteen, (1316) varas.

9. In holding possession of the land described in section eight just above, as aforesaid, Smith so claimed and held it, openly and

notoriously, as a part of section twenty-eight, and with reference to, and as marked by the lines of section twenty-eight as above shown, and not as a part of sections twenty-seven and ninety-one, or either of them.

Of the matters set out in this section, Plaintiff had notice long prior to filing the petition.

10. Save the land described in section eight just above, Smith has not now, nor has he ever had or claimed to have, either title or possession of the land described in the petition. Of all of which the Plaintiff had notice prior to filing the petition.

And this, Smith is ready to ver-fy. Wherefore, he prays judgment if this Court ought or will try this cause prior to the determination of said cause in this State Court.

L. S. KINDER,
WM. BERNE,
Att'ys for T. Smith.

33 STATE OF TEXAS, *County of Floyd:*

Before me, the undersigned authority, on this day personally appeared T. Smith, who first having be-n by me duly sworn, under oath says that he is a defendant in the above suit in the Circuit Court of the United States, and that the foregoing plea, and the allegations made and the facts set out therein, are true in substance and in fact.

T. SMITH.

Sworn to before me, and subscribed in my presence, by said T. Smith on this the 20th day of November, 1903.

ARTHUR B. DUNCAN,
County Judge, Floyd County, Texas.

II.

Not waiving the foregoing plea, but relying and insisting thereon, and in event only that it be overruled, Smith avers:

1. Save as to the land described in section two below, he has not now, nor has he ever had or claimed to have, either title or possession of the land described in the petition, or any part thereof.

2. As to the land below described in this section, he denies all and singular, the allegations of the petition. Smith also denies, all and singular, the allegations of the petition of damage for use of the land therein mentioned and from *conversation* of improvements. And of all these matters, Smith puts himself upon the Country.

The land mentioned above in this section is situated in Floyd County, Texas, is a part of that described in the petition, and is described as follows: Beginning at the Northeast corner of section twenty-eight, as that section has been described in the foregoing plea. Thence South Nineteen Hundred, eight-tenths, (1900.8) varas to Southeast corner of that survey. Thence with the South

line of said survey, West to its intersection with the West line of section ninety-one, as the latter section is described by physical objects in the petition. Thence North with the West line of
34 section ninety-one described as aforesaid to the Northwest corner of that section, and North from said corner with the West line of section twenty-seven, as the latter is described by physical objects in the petition, to the intersection of that line with the North line of section twenty-eight. Thence East to place of beginning.

3. As to the land described in section two just above, he pleads not guilty of the wrongs and trespasses in the petition alleged, and of this he puts himself upon the country.

Wherefore, he asks to be dismissed.

L. S. KINDER,
WM. BERNE,
Att'y- for T. Smith.

Endorsed as follows: No. 284. At Law. In the Circuit Court of the United States for Northern District of Texas, at Fort Worth. J. T. Smithers, *vs.* R. C. Reagan, *Et Al.* Answer of T. Smith. Filed 13th day of Nov. 1903. J. H. Finks, Clerk. By J. B. Finks, Deputy. L. S. Kinder, Wm. Berne, Att'ys for Smith.

35 *First Amended Original Petition.*

Filed February 23rd, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Spring Term, 1905.

C. L. No. 284.

J. T. SMITHERS ET AL.
vs.
R. C. REAGAN ET AL.

To the said Honorable Court:

The Plaintiff, J. T. Smithers, complaining of the defendants, R. C. Reagan, T. Smith, Jno. Deven, S. A. Greer, C. F. Lee, A. M. Monteith, W. E. Hall, George C. Pendleton, Alexander Anderson, James B. Daniels and Ella J. Daniels, who are hereinafter called defendants, now comes and files this his First Amended Original Petition, in lieu of said Original Petition filed herein Sept. 9th, 1903, and for cause of complaint respectfully shows and makes known to the Court:

(1.) That the Plaintiff, J. T. Smithers, is a citizen of the county and state of New York, and resides in said county and state. That the defendants, R. C. Reagan, T. Smith, Jno. Deven and S. A. Greer reside in Floyd County, Texas, and are citizens of the State of Texas. That the defendant, C. F. Lee, is a resident and citizen

of Jack County, Texas, residing at Gibtown, in said County, and is a citizen of the State of Texas. That the defendants, A. M. Monteith, W. E. Hall and George C. Pendleton, reside in Bell County, Texas, and are citizens of the State of Texas. That the Defendants, James B. Daniels and Ella J. Daniels are residents and citizens of the State of Kentucky, and reside in the City of Covington in said State. That the defendant, Alexander Anderson, resides in Pike County, State of Illinois, a-d is a citizen of said State.

(2.) Plaintiff shows to the Court that heretofore, to-wit; on the 15th day of January, 1902, the Plaintiff was lawfully seized and possessed of those certain tracts or parcels of land situated in Floyd County, Texas, and hereinafter described, holding the same
36 by title in fee simple and entitled to the possession thereof, and was upon said date in lawful and undisturbed possession of said land.

That afterwards, to-wit, upon the day and year last aforesaid, the defendants, Reagan, Smith, Greer, Lee and Deven, together unlawfully entered upon said premises and dispossessed Plaintiff thereof, and have ever since said date unlawfully withheld from the Plaintiff the possession thereof to his damage $2000.00.

That said defendants who dispossessed Plaintiff, set up some sort of paper title to the lands other than those hereinafter described by the Plaintiff, and by means of said claim wrongfully asserted some title to the land owned by the Plaintiff.

That said lands are bounded and described as follows, viz:

First tract: Known as Abstract No. 263, Sufvey No. 27, Block "G," by virtue of certificate No. 30/371, issued to the T. & N. O. R. R. Co. and described as follows: Beginning 19 miles and 1617 vrs. North, and 15 miles West from the Southeast corner Sec. 37, Block 28, for the I. & G. N. R. R. Co. on White River, (being the section that includes Dewey's Lake,) for the Southeast corner of this survey; Thence North 1900 varas: Thence West 1900 Vrs. Thence South 1900 Vrs; Thence East 1900 Vrs. to the beginning.

Second tract: Known as survey No. 91, Block "G," on the Waters of White River, a tributary of the Brazos River, by virtue of Scrip No. 734 issued to the Tyler Tap R. R. Co, beginning at the Northeast corner of survey No. 90, Block "G," Scrip No. 733, of this Company for the Northwest corner of this Survey; Thence South 1900-8/10 vrs. to a stake and mound for the Southwest corner of this survey; Thence East 1900 Vrs. to a stake and mound for the Southeast corner of this survey; Thence North 1900 vrs. to a stake and mound for the Northeast corner of this survey; Thence West 1900 vrs. to the beginning; Said land patented to James B. Daniels, June 14th, 1881.

Plaintiff shows to the Court, that said two tracts of land are contiguous and adjoining, and that said survey No. 91, adjoins on the North said survey No. 27; that said lands contain 1280
37 acres and were fenced, and have been for many years under fence by vendors of Plaintiff. that is to say, there was a fence consisting of cedar posts and barbed wire, joined the entire tract of land, being two miles long North and South, and one mile

wide East and West, and said fences being on the East and West sides of said tract two miles long and North and South one mile; and that said lands are further described with reference to physical objects as follows: Beginning at the Southeast corner of said survey No. 27, and the Northeast corner of No. 91, at a point on the East line of a fence erected by Pendleton, Monteith, and Hall, Plaintiff's vendors being at a point 9962.91 varas east and 551.59 North of the Northwest corner of survey No. 1, to Block C, Certificate No. 139, I. & G. N. R. R. Co.; as fixed by an earth mound three feet high; thence North with said fence, which is also called the Pendleton fence, 1900 vrs. to the Northeast corner of survey No. 27, as fixed by said fence, being the Northeast corner of said Pendleton fence. Thence West with the North line of said fence 1900 vrs. to corner. Thence South on the West line of said section No. 27, at all points at the place where the fence erected by said Pendleton and others formerly stood, at 1900 vrs. Southwest corner of No. 27 at 3800 vrs. The Southwest corner of said No. 91, and the Southwest corner of said Pendleton fence. Thence East with the South line of said Pendleton fence, and the South line of said No. 91, 1900 vrs. to the Southeast corner of said fence: Thence North with said fence, 1900 Vrs. to place of beginning.

Plaintiff shows that the Defendant, Reagan, wrongfully claims a part of said section No. 27 as being a part of section No. 31, which he claims to own, and the Defendant, Smith, wrongfully claims a part of said section- No. 27 and No. 91 as being a part of section No. 28; and the defendant, Greer, wrongfully claims a part of said section No. 91, as a part of section No. 90; And the defendant-, Deven and Lee wrongfully claims that they own some part of the land claimed by Plaintiff herein as a part, of section- No. 27 and No. 91. That all of said Defendants have jointly taken possession of Plaintiff's said land.

The Plaintiff shows to the Court that the Defendants ought not to be permitted to maintain their defense herein, for the reason
38 that the Plaintiff, claiming under the sovereignty of the soil, the State of Texas, has had peaceable, adverse and exclusive possession of the lands herein described, using and enjoying the same for more than three years prior to the institution of this suit.

Wherefore, he says that he has acquired title to said land under the statute of limitations of three years.

And now comes the Plaintiff and says that he and those under whom he claims, claiming under deeds duly registered, have had and held peaceable, adverse and exclusive possession of the land herein described, by physical objects, holding the same against all persons, using and enjoying said lands and paying all taxes thereon, for more than five years prior to the institution of this suit; and this he is ready to verify.

Plaintiff says that this is an action to fix and determine the boundary of the 1280 acres of land in controversy, which now exceeds in value the sum of $5000.00. That the boundaries of said surveys are confused and uncertain, and that the entire land is the subject

matter of this controversy, as between the Plaintiff and each and all of said Defendants.

Plaintiff shows that heretofore, to-wit, on the 19th day of Sept. 1901, the Defendant, A. M. Monteith made, executed and delivered to this Plaintiff his deed with covenants of general warranty conveying the said survey No. 27, in consideration of the sum of $1600 paid to him by the Plaintiff; and by the terms of said deed he bound himself to warrant and forever defend the title to said 640 acres of land against every person whomsoever lawfully claiming the same or any part thereof.

That on the 19th day of Sept., 1901, the Defendants, A. M. Monteith, George C. Pendleton and W. E. Hall, made, executed and delivered to Plaintiff, their deed with covenants of general warranty, whereby they bound themselves, in consideration of the sum of $1600 paid to them by the Plaintiff, to warrant and forever defend the title to said survey No. 91, Block "G."

That heretofore, to-wit, on the 31st day of May, 1890, the Defendants, James B. Daniels and Ella J. Daniels, who then resided
39 in the State of Kentucky, made, executed and delivered to the defendants, A. M. Monteith, Hall and Pendleton, all and singular, said survey No. 91, in consideration of $960 to them paid by said vendees; that they bound themselves to warrant and forever defend said premises; That they were the true and lawful owners thereof, and that the title so conveyed was free, clear and unencumbered, and that they would warrant and forever defend the same against all claim or claims except taxes after January, 1, 1890. That said purchase was made at the rate of $1.50 per acre, and said Daniels represented that said survey contained 640 acres.

That heretofore to-wit, on the 6th day of May, 1890, the defendant, Alexander Anderson, in consideration of the sum of $800. to him paid by A. M. Monteith, made, executed and delivered to said A. M. Monteith, a deed conveying survey No. 27, Block "G", whereby they bound themselves to warant and forever defend the title to said land as against any person whomsoever lawfully claiming the same or any part thereof. That said land was sold at $1.25 per acre and by the acre, and said Alexander represented that there were 640 acres of said land.

That by the terms of each and all of said deeds, the grantors therein became liable, and promised Plaintiff and those claiming under said deed, that they would warrant and forever defend the title to said land.

That by the acts of the defendants, Reagan, Smith, Greer and Deven in taking possession of said land and dispossessing the Plaintiff thereof, and claiming the same as parts of other surveys, they have put the rights of Plaintiff in jeopardy, and the defendant- who have warranted said lands are required, under the terms of the covenants in their deeds, to now appear and defend this suit, as that there is danger to Plaintiff of losing said land.

That the covenants of warranty claimed in the deed by Anderson and that by Daniels and wife, have inured to the Plaintiff, and the Plaintiff is entitled in this suit to rely upon the same.

Plaintiff shows that the said land owned by him is of the value of $5000, and that the value of the sum or amount in controversy in this case is the sum of $5000 besides damages; That the controversy in this case is wholly between the citizens of different States.

40 That the Defendants, Greer, Reagan, Smith, Lee and Deven have destroyed and removed a large part of the fencing and other improvements placed upon said land by the Plaintiff and those claiming under him, and have thereby injured said property in the sum of $2000.00: That said land is valuable for farming and grazing purposes, and that its rental value is the sum of $150 per annum: That since ejecting Plaintiff from said land, the defendants have been in exclusive possession thereof, using and enjoying the same and denying to Plaintiff any right to such possession.

Wherefore Plaintiff comes and prays that defendants be cited to answer hereto; that said warrantors be vouched in and required to take notice of this proceeding, and that they be concluded by the result of this suit; and that, in the event said lands be lost to Plaintiff, either in whole or in part, that Plaintiff recover as against the said Monteith, Pendleton and Hall and against the said Daniels and wife and Alexander Anderson, the sume of money paid to them as consideration for said land, with interest thereon from the date of such conveyances respectively. He further prays for title to and possession of said land as against the said defendants, for his damages, rents and profits, all costs of suit, and for general relief. He further prays that he may be awarded a writ of possession of and restored to the peaceable possession of said land; that the boundary lines of the lands between Plaintiff and the defendants be established by and with reference to the fences heretofore constructed by Plaintiff and his vendors joining said sections Nos. 27 and 91, and that they have such other and further relief as they may be entitled to under the pleading and evidence in this cause.

MATLOCK, MILLER & DYCUS,
Attorneys for Plaintiff.

Endorsed as follows: No. 284. C. L. J. T. Smithers, *vs.* R. C. Reagan, *et al.* 1st Amended Original Petition. This suit is brought as well to try title as for damages. Filed 23rd day of February, 1905. J. H. Finks, Clerk. By J. B. Finks, Deputy.

41 *Motion of Each Defendant for Severance.*

Filed March 17th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284. L.

J. T. SMITHERS
v.
R. C. REAGAN.

Now comes the Defendants, C. F. Lee, R. C. Reagan, S. A. Greer, and T. Smith, each for himself, and separately moves this Honorable Court for a severance on the trial hereof, and that each defendant have a several and separate trial as to the matters in controversy severally and separately set up in their answers herein filed; and they pray for all proper orders and relief in the premises.

L. S. KINDER,
SAM J. HUNTER,
Att'ys for Each of the Defendants.

Endorsed as follows: No. 284 L. J. T. Smithers, *vs.* R. C. Reagan *et al.* Motion of each Defendant for Severance. Filed 17th day of March, 1905. J. H. Finks, Clerk. By J. B. Finks, Deputy.

42 *Plea and Separate Answer of C. F. Lee.*

Filed March 23rd, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284. L.

J. T. SMITHERS
v.
R. C. REAGAN.

Now comes the defendant, C. F. Lee, and for plea to the jurisdiction of this Court over the subject matter of this suit, he says:

That he is the owner and in possession of Section 32, of Block G, in Floyd County, Texas, located by virtue of certificate No. 309, issued to the Tyler Tap Railway Company, containing in all 640 acres; that he holds his title to same by mesne conveyance under the State of Texas, and not as a joint tenant or tenant in common with either or any of the other defendants in this cause, but independently thereof; that of the lands described and set forth by metes and bounds, course and distance, as claimed in Plaintiff's petition, he is the owner and has possession of only 96 acres of the lands claimed by

Plaintiff to be a part of his section No. 27, The parcel of land in dispute and in controversy between the Plaintiff and himself is bounded and described as follows:

Beginning at the Northeast corner of Section 27, as claimed by the Plaintiff and described in his petition; Thence West 466 varas to the original West line of section 32, claimed by this defendant; Thence South with said original line of 32,163 varas to the Southwest corner of section 32, as claimed by defendant. Thence East 466 varas with the South line of said 32, as claimed by this Defendant, to a stake in the East line of section 27, as claimed by the Plaintiff in his petition, the same being in the North line of section 27, as it actually is and was located upon the ground, and 466 varas east of the Northwest corner of said 27, as it was actually located upon the ground; Thence North 1163 varas with the East line of Section 27, as claimed by Plaintiff in his petition, to the place of beginning, containing as aforesaid, 96 acres of land.

That there is not and was not at the date of the institution of this suit by the Plaintiff in this Court, any improvements on said land in controversy other than a string of posts and wire fence less
43 than one mile in length, which string of fence was removed by this defendant from the North line of the land, as claimed by Plaintiff in his petition and rebuilt on the true South line of section 32, as hereinabove described, but all of said fence is still on the land, as claimed by the Plaintiff in his petition, as will be shown by reference to a map or plat of the same filed herewith and referred to as part of this plea. That the whole of said fencing was of value less than $50.00, and was worth less than $50.00 at the date of institution of this suit; that the rental value of said 96 acres so in controversy, was not worth at the date of institution of this suit more than $10.00 per annum, and the whole amount of rent claimed, or which could be lawfully claimed on said land for the whole time, which has been held in adverse possession by the defendant and by John Deven, his grantor, is not and was not of value more than $50.00 and no damages or injury has been done to said land in any manner whatever by the defendant or his grantor, John Devan, prior to the institution of said suit or since; that the matter in controversy in this suit does not and did not exceed $2,000.00 in value, but is far less than said sum. That the claim of Plaintiff as set forth in his petition as to the value of said land, improvements, rent and damages exceeding $2,000.00, has been fraudulently alleged with the intent and purpose to confer jurisdiction upon this Honorable Court, when in truth and in fact, no such jurisdiction existed, because the matter in controversy is of less than $2,000.00 in value.

The defendant disclaims all other lands claimed in Plaintiff's petition, except 96 acres and never did claim any of the other lands claimed in said petition, and this the Plaintiff well knew when he filed this suit against him. He disclaims all other portions of section 27, as claimed by the Plaintiff, except the 96 acres aforesaid, all of which he is ready to verify.

L. S. KINDER,
SAM J. HUNTER,
Att'ys for Defendant C. F. Lee.

C. F. Lee says the statements contained in the foregoing plea, are true in substance and in fact.

C. F. LEE.

Sworn to and subscribed before me, by the Defendant, C. F.
44 Lee, on this the 21st day of March, A. D. 1905.

B. F. ALEASLEY,
[SEAL.] *A Notary Public in and for Jack County, Texas.*

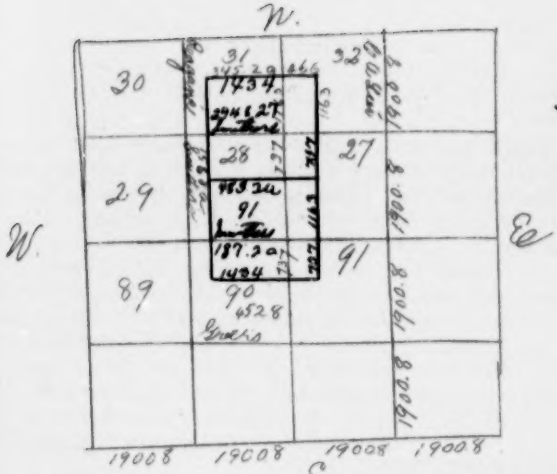
Not waiving his plea to the judisdiction aforesaid, but still insisting and relying thereon, the Defendant, C. F. Lee, disclaims all interest, right, title or possession in and to all the land described in Plaintiff's petition and every portion thereof, except the 96 acres described in his plea to the jurisdiction hereinbefore set out, to which he here refers for description of said 96 acres. That he holds possession and title thereto under the State of Texas, as part of Section 32 in Block G, located for the State School fund by virtue of certificate number 309, issued to the Tyler Tap Railway Company, located in Floyd County, and that said section 32 is bounded and described on the ground as follows:

Beginning at the Northwest corner of section No. 27, Block G, T. & N. O. R'y Co.; as originally located, a stake 1434 varas East from the East line of section 27, as claimed by the Plaintiff and described in his petition. Thence north 1900.8 varas — the Northeast corner of this survey. Thence West 1900.8 varas for its Northwest corner, the Northeast corner of section 31, Block G, Tyler Tap Railway Company survey, as originally located: Thence South 734 varas cross the North line of Section 27, as claimed by the Plaintiff in his petition, continuing South 1900.8 varas with the original West line of Section 32 to its Southwest corner a stake 466 varas West of the East line of Section 27, as claimed by Plaintiff in his petition the same being the Northwest corner of Section 27 and the Northeast corner of Section 28, Block G, T. & N. O. Ry. Co.'s survey as originally located on the ground. Thence East 466 varas the East line of section 27, as claimed by Plaintiff in his petition, a stake in the North line of Section 27, the South line of Section 32, as claimed by Defendant, continuing East 1900.8 varas with the North line of Section 27 to the place of beginning.

That as to the said 96 acres of Section 32, as hereinabove described and claimed by the Plaintiff, he denies all and singular the allegations in Plaintiff's petition contained, and says he is not guilty of the wrongs, injuries, and trespasses alleged against him, and of this he puts himself upon the Country. Wherefore, he prays to be dismissed hence with his costs.

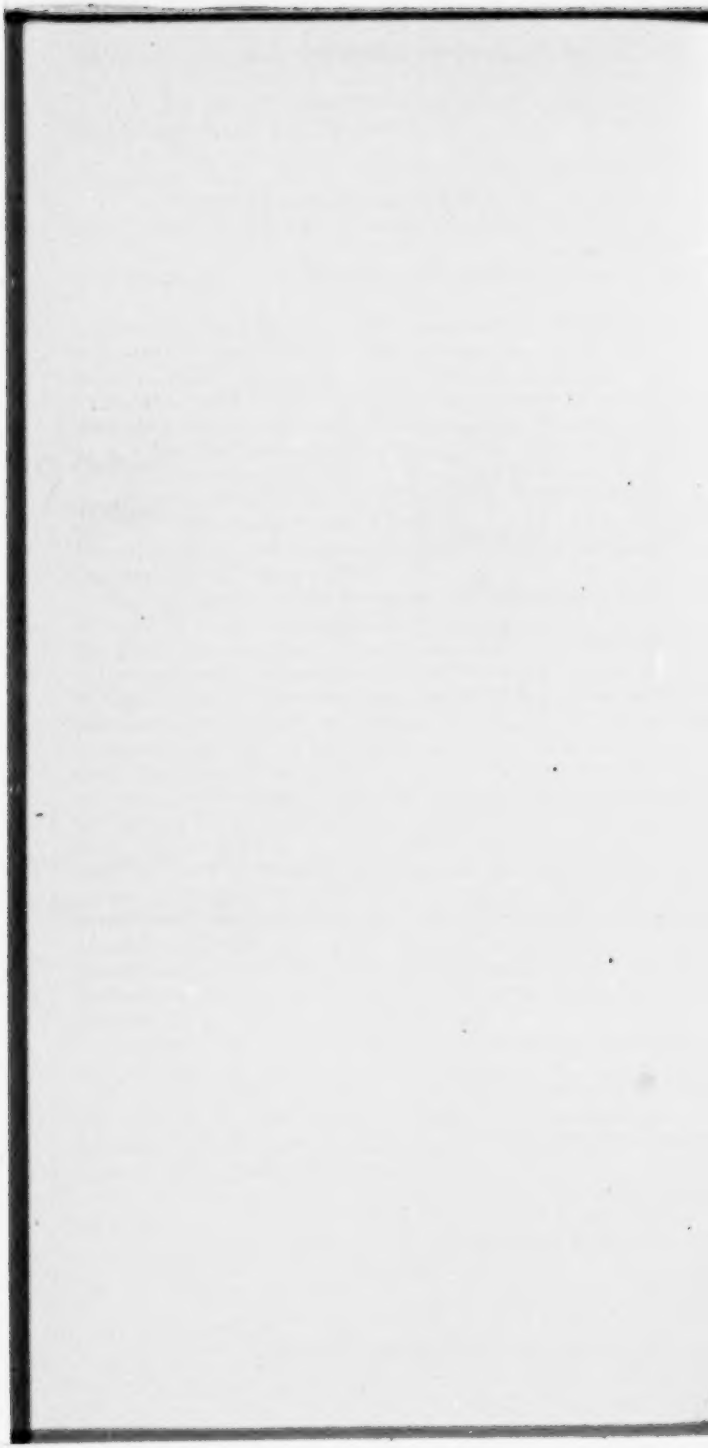
L. S. KINDER,
SAM J. HUNTER,
Att'ys for Defendant C. F. Lee.

(Here follows plat marked page 45.)



Red lines show 27 & 91 as Defendants claim them

Black lines show 27 & 91 as Plaintiff claims them.



46 Endorsed as follows: No. 284 Law. J. T. Smithers, *vs.* R. C. Reagan, *et al.* Plea and Separate Answer of C. T. Lee. Filed 23rd day of March 1905. J. H. Finks, Clerk. By J. B. Finks, Deputy.

47 *Answer of Jas. B. and Ella J. Daniels.*

Filed March 31st, 1905.

No —.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Now comes the defendants, James B. Daniels and Ella J. Daniels, and answering the Plaintiff's petition herein, they deny, all and singular, the allegations in said amended petition contained, in so far as said allegations charge a sale and conveyance of the land in controversy to the Plaintiff or those under whom he claims.

That as to all of the allegations made by Plaintiff, charging an ownership of the said land by Plaintiff, and the five years statute of limitations, these defendants adopt said allegations and make them their own, and these defendants plead that the Plaintiff has acquired the title both under the three years Statute of Limitations, under which Plaintiff deraigns his title from the sovereignty of the soil, and the five years Statute of Limitations under deed duly registered; and this these defendants are ready to verify.

WM. HARTLEY PUGH,
Attorney for Defendants Above Named.

Endorsed as follows: No. 284. J. T. Smithers, *vs.* R. C. Reagan, *et al.* Answer of James B. and Ella J. Daniels to Amended Pt. of Plaintiffs. Filed 31st day of March, 1905. J. H. Finks, Clerk. By J. B. Finks, Deputy. Wm. Hartley Pugh, Attorney for Defendants.

48 *Amended Plea and Separate Answer of T. Smith.*

Filed March 31st, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284. L.

J. T. SMITHERS
v.
R. C. REAGAN ET AL.

Now comes the defendant, T. Smith, and by leave of the Court amends his original answer filed herein on the 23rd day of November,

1903, and in lieu of his said answer files the following, to-wit:

Now comes the defendant, T. Smith, and for plea to the jurisdiction of this Court over the subject matter of this suit he says:

That he is the owner and in possession of section 28, of Block G, in Floyd County, Texas, located by virtue of certificate No. 30/371, originally granted to the T. & N. O. Ry. Co.; and more fully described as follows: Beginning at a stake in earth mound marked by four pits 1900.8 varas East of a stone set in the ground marked by two pits about 25 varas Northwest of Sand Hill School House, established by H. C. Knight, surveyor of Crosby Land District for Northwest corner of survey No. 29, same Block, same being the Southwest corner of section No. 30 for the Northwest corner of this survey. Thence East 1872 varas to a stake a mound marked by four pits in the South line of section No. 31, same Block, for Northeast corner of this survey. Thence South 1900.8 varas to a stone in ground for Southeast corner of this survey. Thence West 1872 varas to a stone in the North bank of Running Water Draw for the Southeast corner of No. 29, same Block, and Southwest corner of this survey. Thence North 1900.8 varas to the place of beginning.

That of the land described and set forth by metes and bounds course and distance, as claimed in Plaintiff's petition, he is the owner, and has possession of only 443 acres of the lands so claimed by the Plaintiff to be part and parcel of his section- 27 and 91, holding and claiming title thereto now, and at the date of the institution of this suit, in his own separate right, as purchased from the State of Texas, and not as a tenant in common or a joint tenant with S. A. Greer or any other person. The parcel of land in dispute or in controversy between the plaintiff and this defendant is bounded and described as follows:

49 Beginning at a stone in ground 118 varas west of the South East corner of survey No. 31, made for R. C. Reagan for the Northeast corner of this survey, said stone being 3682 varas East of stone set in the ground by H. C. Knight for the Northwest corner of section 29, said Block G. Thence West 1316 varas to Northwest corner of the tract in controversy a stake in West line of Pendleton fence, being the West line of section 27, as claimed by the Plaintiff, and described and set forth in his petition. Thence South with the west line of Pendleton fence Row, being the West line of sections 27 and 91, as claimed by the Plaintiff, and set forth in his petition, 1900.8 varas to a stake for corner in West line of said Pendleton fence row, same being the Southwest corner of the tract in controversy. Thence East 1316 varas to the Southeast corner of this survey. Thence North 1900.8 varas to the place of beginning.

That on the 9th day of September, 1903, the day Plaintiff's suit herein was filed in this Court, the only improvements upon said 443 acres of land in controversy was a string of posts and wire fence one mile in length, on the West side of said above described 443 acres, and about sixty acres of said land was broken and put in a state of cultivation: That said 443 acres of land at

the date of the institution of this suit was not of value more than $3.00 per acre. That said mile of fence was not of value more than $50.00, and that said sixty acres of broken land was not of value more than $1.00 per acre over and above the price of $3.00 per acre, aforesaid, for the raw land, and the whole of said 443 acres of land, 60 acres thereof being broken and in cultivation and the one mile of fence, together with the rental value of said land, from the year 1901, when he took actual possession thereof, which rental value did not exceed $23.00 per annum, did not exceed in value $2,000.00, but was of value only $1508.00 and no more, and there had been no damage done to said land by defendant in any amount whatever. And said defendant says that the valuation placed thereon by the Plaintiff in his petition at exceeding $2,000.00 and that he and S. A. Greer jointly took possession of said lands claimed by Plaintiff, has been fraudulently claimed and alleged for the intent and purpose of conferring jurisdiction upon this Honorable Court, when in truth and in fact no such jurisdiction existed, because the whole matter in controversy is and was of less value than $2,000.00.

The defendant disclaims all other lands claimed in Plaintiff's petition, except the 443 acres bounded and described as above, and never did claim any of the other lands claimed in Plaintiff's petition, and this the Plaintiff well knew when he filed this suit against him. He disclaims all other portions of sections 27 and 91, as claimed by the Plaintiff, except the 443 acres aforesaid.

L. S. KINDER AND
SAM J. HUNTER,
Attorneys for Defendant T. Smith.

T. Smith says the statements contained in the foregoing plea are true in substance and in fact.

T. SMITH.

Sworn to and subscribed before me by the Defendant T. Smith, on this — day of March, A. D. 1905.

____ ____,
Clerk of the Circuit Court of the United States,
By T. SMITH, *Deputy.*

Not waiving his plea to the jurisdiction aforesaid, but still insisting and relying thereon, the defendant, T. Smith, disclaims all interest, right, title or possession in and to all lands described in Plaintiff's petition and every portion thereof, except the 443 acres described in his plea to the jurisdiction hereinabove set out, to which he here refers for description of said 443 acres; that he holds possession and title thereto under the State of Texas, as part of section 28 in Block G, located for the State School fund by virtue of certificate No. 30/371, T. & N. O. Ry Co. in Floyd County, Texas, said section being bounded and described as hereinabove first set forth in his said plea to the jurisdiction to which reference is here made for the full description of said section 28. That as to the

said 443 acres of section 28, as hereinabove described and referred to and claimed by the Plaintiff, he denies all and singular the allegations in Plaintiff's petition contained, and says he is not guilty of the wrongs, injuries and trespass alleged against him, and of this he puts himself upon the Country.

That for further plea in this behalf the said defendant says
51 that heretofore, to-wit, on October 28th, 1901, the Plaintiff filed his suit of trespass to try title and to establish the boundary line as claimed by him in the District Court of Floyd County, Texas, said suit being No. 355 on the docket of said Court, to recover of this defendant and of S. A. Greer, the title and possession of the 443 acres of land described above; that the defendant filed an answer in said cause and a cross-petition against the plaintiff claiming title and possession of Section 28, as hereinabove first set out, as also did the defendant Greer, claiming title and possession of his Section 90, which adjoins the defendant's Section 28 immediately on the South of which said action and cross-action said State Court had jurisdiction; that plaintiff claimed the land in controversy as hereinabove set out as parts of Sections 27 and 91 while the defendant claimed said land as being part of Section 28, Block G. as aforesaid.

That on Sept. 2, 1902, the plaintiff dismissed his said cause of action and on the 3rd day of September 1903, the said cause coming on for trial this defendant recovered judgment against said plaintiff for the title and possession of Section 28, as first above described, as also did defendant Greer on his cross action for the lands claimed by him as being Section 90 of said Block G. and in said judgment writs of possession were awarded to this defendant and to the said Greer respectively.

That afterwards, the said plaintiff herein being plaintiff in said cause 355, on the identical same cause of action as set forth in his petition in this cause, gave notice of appeal to the Court of Civil Appeals in and for the second supreme judicial district of Texas, and perfected and appeal and on the 3rd day of November 1902, he filed a transcript of the record in said cause 355 in said court of civil appeals, having on the 19th day of August 1903, filed in the District Court of Floyd County, his application and bond for writ of error to remove said cause to said appellate court for revision of the judgment aforesaid, whereby the said court of civil appeals acquired jurisdiction of said cause; that
52 on the — day of ——, 1904, the said court, of civil appeals modified said judgment by striking the field notes therefrom, but in no otherwise and thereupon affirmed the same, and the Supreme Court of Texas upon application made thereto refused the writ of error and also dismissed the same, upon the ground that the action and judgment of the Court of Civil Appeals was final the said cause being a boundary suit; that while there are other parties made to this suit who claimed other and different portions of land from that in controversy herein between this defendant and the plaintiff, yet the very same identical land and the same identical issues are involved in this case that are involved in cause

No. 355 aforesaid. Wherefore this defendant says that the matters and things here now put in controversy in this action *has* been adjudicated and finally set aside and disposed of in said cause No. 355 in the District Court of Floyd County and in the Court of Civil Appeals of the Second Supreme Judicial District of Texas, as aforesaid, and this he is ready to verify.

Wherefore he prays to be dismissed hence with his costs.

L. S. KINDER AND
SAM J. HUNTER,
Attorneys for Defendant T. Smith.

Endorsed as follows: No. 2854 L. J. T. Smithers *v.* R. C. Reagan, *et al.* Amended plea and separate answer of T. Smith. Filed 31st day of Mch. 1905. J. H. Finks, Clerk, By J. B. Finks, Deputy.

53 *Answer to Motion to Sever.*

Filed March 31st, 1905.

In the Circuit Court of the United States at Fort Worth.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Now comes the plaintiff and answering the motion of the defendants, Reagan, Smith, Greer and Lee for a severance herein, says that such severance should not be granted but that this cause should be tried as one cause and that the court should refuse said motion for the following reasons to-wit:

(1.) Plaintiff denies that each of the defendants is in possession of a separate and distinct tract of land from that of the other defendants but says to the contrary that said defendants took possession of said land belonging to plaintiff jointly, and that if they have parceled said land out among themselves this does not make their claim of title as to plaintiff separate nor does it require the plaintiff to litigate with each one of them separately.

(2.) That defendants are in possession of other parts of the land than that described in thir respective answers and whether they claim title to the land or not is immaterial for the purposes of this case as they were in possession of such other parts, and together of all of said land, at the date of the institution of this suit and prior thereto, and that said defendants, or some of them, have taken possession of, torn down and removed a large portion of the fences around said land and that plaintiff believed and has in good faith charged that all of them have been connected with such wrongful acts and that all of them contributed to the acts which dispossessed plaintiff of his lands.

(3.) Plaintiff shows that this case involves a question of boundary only, that it does not involve the boundary of each particular tract of land claimed by the several defendants, but the lines and corners of the entire 1280 acres of land in controversy, which ex-
54 ceeds in value $5000, and that there are many theories by which said lands can be located. Plaintiff claims them to be located according to the manner in which he has them fenced, but their true location depends upon the testimony of various witnesses, records and maps, and that any one of a number of theories may be adopted which will locate said land not in accordance with the contention of plaintiff or with the contention of defendant, and that it is absolutely necessary to have all of the parties before the court in order to determine the *w*uestion of boundary because, otherwise, it will require four separate trials involving exactly the same issues and entail four times the work upon the court and the jury and counsel in the case than would be involved in a common trial, and that a final disposition of the question because the jury in one case might decide as to one defendant exactly opposite from the jury in the other case, when the issues are identically the same, and the fixing of anyone of the plaintiff's lines as to one of the defendant's will fix it as to all of the defendants. Whereas, different verdicts and different trials would lead to a lack of uniformity and seriously complicate an equitable disposition of the whole case that each and every defendant is equally interested in the true location of every boundary of plaintiff's and that the settlement as to the lines of any one of the tracts claimed by defendants will necessarily and of right settle the true location as to each and every other defendant.

(4.) Plaintiff further says that as joint trespassers, which he charges the defendants to be, they are not entitled to a severance in this cause, and thats each *is* being responsible for the damages occassioned by his fellow trespassers is a necessary party to a trial involving either of the other defendants because plaintiff is
55 entitled to a joint recovery for damages against all of them.

Wherefore, plaintiff prays that said motion be denied.

MATLOCK, MILLER & DYCUS,
Attorneys for Plaintiff.

Endorsed: No. 284 L. J. T. Smithers *vs.* R. C. Reagan, *et al.* Answer to motion to sever. Filed 31 day of Mch. 1905. J. H. Finks, Clerk By J. B. Finks, Deputy.

56 *Judgment.*

Entered March 31st, 1905.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, March Term, A. D. 1905.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

MARCH 31ST, 1905.

This day this cause was called for trial; the plaintiff J. T. Smithers appeared by his attorneys and announced ready for trial; the defendants R. C. Reagan, T. Smith, S. A. Greer and C. F. Lee each appeared by their attorneys and announced ready for trial; also J. B. Daniels and Ella J. Daniels appeared by their attorney and announced ready for trial; the defendants A. M. Monteith, W. E. Hall, George C. Pendleton and Alexander Anderson appeared not, but wholly made default.

Whereupon said defendants Reagan, Smith, Greer, and Lee having filed their separate and several pleas to the jurisdiction of this court under oath herein, each in his separate plea disclaims as to all the lands claimed and described in plaintiff's petition, except the certain tract of land set out by metes and bounds in his separate plea, and averred that the matter in dispute between himself and the said plaintiff was of value less than $2000.00, and that the allegations of plaintiff as to joint trespass by defendant and as to damages and values exceeding $2000.00 were fraudulently made for the purpose of conferring jurisdiction on this court presented his several and separate motion to sever on the trial of this cause, praying that each of said defendants be permitted to try the issue joined between himself and the plaintiff as to his separate and distinct tract of land separately and severally: Said motion, after due consideration, was by the court overruled, to which ruling the defendants each excepted.

Thereupon came on to be heard the separate pleas of the defendants to the jurisdiction of the court and a motion by the said defendants to try said pleas separately from the merits of the case, and a jury being waived in writing, it was agreed that the
57 matters of fact as well as those of law, be submitted to the court; and the court after hearing the evidence and argument of counsel and being sufficiently advised, is of opinion that the law and facts are for the defendants on said pleas to the jurisdiction of the court. And the court finds from the evidence that the said pleas of each of the said defendants Reagan, Lee, Smith and Greer is fully proved and sustained and that this court has no jurisdiction over the subject matter in dispute, as pleaded and set forth

in the plaintiff's petition and in the said several pleas of the said defendants.

It is therefore considered, ordered and adjudged by the court that the plaintiff's suit herein be dismissed for want of jurisdiction, as aforesaid, and that the said defendants R. C. Reagan, T. Smith, S. A. Greer, and C. F. Lee, and each of them, do have and recover of and from the said plaintiff J. T. Smithers all their costs in this behalf expended for which let execution issue.

It is further ordered and adjudged that the defendants James B. Daniels and Ella J. Daniels, A. M. Monteith, W. E. Hall, George C. Pendleton, and Alexander Anderson be also dismissed hence from this court in this cause, for want of jurisdiction of this court, and that they have and recover of the said plaintiff all their costs by them laid out and expended, for which they may have their execution. It is further ordered that the officers of court do have and recover of and from the parties hereto respectively the costs by them herein incurred, for which let execution issue.

To all of which the plaintiff, J. T. Smithers, in open court excepts and gives notice of his intention to prosecute a writ of error from the judgment and action of this court in sustaining said pleas of the defendants Reagan, Lee, Smith and Greer, to the jurisdiction.

It is further ordered by the court that the plaintiff may file his bill of exceptions herein at any time prior to the adjournment.

From Minute Book 2, pages 610 and 611.

58 *Order Granting Extension of Time in Which to File Bill of Exceptions.*

Entered April 8th, 1905.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Texas, March Term, A. D. 1905.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

APRIL 8TH, 1905.

On this day came on to be heard the application of the plaintiff for an extension of the time within which he may file his bill of exceptions herein, and the attorneys for the defendants consenting thereto, it is ordered by the court that the said plaintiff have ninety (90) days from this date within which to prepare and file his bill of exceptions herein.

From Minute book 2, page 623.

59 *Assignment of Errors.*

Filed April 8th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Now comes the plaintiff in the above styled and numbered cause, J. T. Smithers, and submits and files the following assignment of error, which occurred on the trial of the above styled and numbered cause and upon which plaintiff will rely upon his prosecution of the writ of error from the order of this Honorable Court made on the — day of March, 1905, dismissing this cause for want of jurisdiction.

I.

The Circuit Court erred in holding that it did not have jurisdiction of this cause because it was shown that there was the necessary diversity of citizenship between plaintiff and the defendants and that the value of the land in controversy was $3840, exclusive of the rental value and damages sued for and that plaintiff had a right to join all of the defendants in one action inasmuch as the issue in the cause was the true location of the boundary line of surveys Nos. 27 and 91 being the entire 1280 acres in controversy.

II.

That said Circuit Court erred in holding that it did not have jurisdiction of the suit as between the plaintiff and the defendants Smith and Greer for the reason that they were joint trespassers upon a part of the plaintiff's land, which exceeded in value the sum of $2000.00; and there being the necessary diversity of citizenship and the amount in controversy exceeding the sum of $2000.00 the court should have taken jurisdiction of said suit.

III.

60 The Court erred in holding that it could not take into consideration the value of the land in controversy as between the plaintiff and the defendant Smith at the time plaintiff's amended petition was filed, but was confined to the value of said land and the rental value thereof as same existed at the time of the institution of the suit.

IV.

The Court erred in holding that it had not jurisdiction of this cause because the uncontroverted evidence shows that the land in

controversy was of the value of $3 per acre, that the damages claimed was the sum of $2000, that there *was* 1280 acres in controversy between the plaintiff and the defendants and the amount involved far exceeded the jurisdictional value of the court and the defendants had such interest as made them jointly suable by the plaintiff.

In order that the foregoing assignments of error may be and appear of record, the plaintiff presents the same to this court and prays that such disposition be made thereof, as in accordance with law and the statutes of the United States in such case made and provided, all of which is respectfully submitted.

MATLOCK, MILLER & DYCUS,
Attorneys for Plaintiff.

Endorsed as follows: No. 284. J. T. Smithers *vs.* R. C. Smithers *et al.* Assignment of Errors. Filed 8 day of Apl., 1905. J. H. Finks, Clerk, by E. C. VanDusen, Deputy.

61 *Petition for Writ of Error.*

Filed April 8th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

To the Honorable the Circuit Court of the United States for the Northern District of Texas:

J. T. Smithers, the plaintiff in the above entitled cause feeling himself aggrieved by the action of this Honorable Court in dismissing this cause, and holding that it had not jurisdiction of the same by judgment entered on the 31" day of March, 1905, comes now by Matlock, Miller & Dycus, his attorneys, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the Supreme Court of the United States, under and according to the laws of the United States, and that your Honors make a certificate showing that the said cause was tried and disposed of in the Circuit Court upon the issue of the jurisdiction of the court, invoked by the defendants, and that the only question tried and determined in said cause was the jurisdiction of said Circuit Court; and petitioner further prays that an order be granted fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that upon the giving of such security, a transcript of all of the proceedings by certificate to the Supreme Court of the United States.

And your petitioners will ever pray.

MATLOCK, MILLER & DYCUS,
Attorneys for Defendants.

The foregoing has the following endorsement, to-wit:
No. 284. J. T. Smithers *vs.* R. C. Reagan, *et al.* Petition for allowance of writ of error. Filed 8 day of Apl., 1905. J. H. Finks, Clerk, by E. C. VanDusen, Deputy.

62 *Order Allowing Appeal and Fixing Amount of Bond.*

Entered April 8th, 1905.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

APRIL 8TH, 1905.

Upon consideration of the foregoing petition for writ of error and for fixing the bond required of plaintiff, it is ordered that a writ of error be and is hereby allowed to the Supreme Court of the United States and that plaintiff be required to give bond in the sum of $500.00.

This the 8th day of April, 1905.

EDWARD R. MEEK,
United States District Judge.

From Minute book 2, page 630.

63 *Bill of Exceptions.*

Filed July 7th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. ——.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Be it remembered that on the 31 day of March, 1905, the above styled and numbered cause came on for trial on the several pleas of the defendants, T. Smith, R. C. Reagan, S. A. Greer and C. F. Lee, urging that the Circuit Court of the U. S. had no jurisdiction over the subject matter of the suit; and then the parties plaintiff and defendants having waived a jury, submitted the matters of fact, as well as of law, to the Honorable Edward R. Meek, District Judge presiding as Circuit Judge, upon the trial of said cause. And thereupon the following proceedings were had:

I.

The defendants offered in evidence the agreement of the parties made and entered into, to the following effect:

(1) That the plaintiff J. T. Smithers is the owner of survey No. 27 by virtue of Certificate No. 30/371 the T. & N. O. Ry. Co., and of survey No. 91 in the name of Tyler Tap Ry. Co., Certificate No. 734 patented to James B. Daniels, assignee. That plaintiff was the legal and equitable owner of such land by title in fee simple, each tract patented to contain 640 acres.

(2) That the defendant R. C. Reagan is the legal and equitable owner, by title in fee simple, of survey No. 31.

(3) That the defendant Lee is the owner, by title in fee simple, of survey No. 32, a section of State School Land not yet patented and that said Lee had as full and complete a title as could be vested in him without the payment of the purchase money and the issuance of a patent.

(4.) That the defendant Smith is the owner, by title in fee
64 simple, of survey No. 28, Certificate No. 30/371, which survey was school land not yet patented nor the purchase money fully paid. Smith owned the same as fully and completely as he could own same without the issuance of a patent.

(5) That the defendant Greer is the owner by title in fee simple, of all of survey No. 90, being the alternate section No. 91. The same had not been patented or paid for but Greer owned the same as fully as he could own it without the payment of the purchase money and the issuance of a patent.

(6) That each of the above defendants above named owned the respective tracts of land referred to as being owned by him, under purchase from the State of Texas, and that the evidence of title in the defendants is a certificate of purchase issued to him in due form of law by the Commissioner of the General Land Office. The purchasers were made long after the issuance of the patents to surveys Nos. 27 and 91.

(7) The plaintiff and R. C. Reagan each have a complete chain of title from the State of Texas down to themselves for the land patented to them and the ownership existed at the date of the institution of this suit.

(8) It was agreed that the purpose of this suit was to fix and establish the boundaries of surveys Nos. 27 and 91.

II.

The relative positions of the lands claimed by the plaintiff and defendants is shown on the following sketch.

III.

The defendants introduced in evidence certified copies of the field notes made by the County Surveyor of Floyd County, in which all of the lands are situated which sketch shows that survey No. 28 as claimed by Smith, contains only 600 acres, and the field notes of sur-

veys Nos. 90, 32, and 31, show that it was surveyed by the said surveyor at the times defendants purchased as contended for by said defendants.

IV.

65 The defendant T. SMITH testified that he settled upon what he contends to be section No. 28, in the year 1899. He found most of the land which he claimed as section No. 28 to have been fenced by Pendleton, Monteith and Hall, the vendors of Smithers, and the fence stood at the places indicated by the red line shown on Sketch (*a*). The house of the defendant Smith was built just west of that fence and he fenced in a small part of his land lying west of said fence. He gave notice to the representatives of Pendleton, Monteith and Hall to move the fence as it was too far west. They refused to do it, and thereupon he (Smith) moved the fence considerably further east so as to enlarge his enclosure. He then turned his cattle into the plaintiff's enclosure and allowed them to remain therein. For a while he did not have enough cattle to pasture his own land. He afterwards received others and he and Greer both turned into the common enclosure formerly occupied by the plaintiff and plaintiff's vendors as a pasture for their cattle. They used the pasture together, that is Smith and Greer. At first there were no cross fences, but afterwards in March 1903 Smith built the fence about where he claimed the south boundary line of section 28 to be, as shown by Sketch (*a*) stopping at his southeast corner as therein shown. Greer then completed the fence from that point east joining it to plaintiff's east fence. Smith testified that he had never claimed that part of the land between the east line of survey No. 28 and plaintiff's east fence being a tract of about 160 acres but *he* it remained in the enclosure and he had the same use of it as he had of his own land. He had never claimed that part of the land and had so informed Bartley, plaintiff's agent. There is now in the enclosure about 720 acres of land, which was part of the land formerly in plaintiff's enclosure 80 acres belonging to Greer, which was really a part of the land em-

braced in the former enclosure of the plaintiff. This 80 acres,
66 by a mistake in putting the fence in between Smith and Greer, included in Smith's enclosure that much of Greer's land. Smith promised to pay Greer rent on this land, and did pay it. Smith only claimed 600 acres of the land in his enclosure. He did not claim the 80 acres which he was paying Greer rent on, nor the 160 acres which he admitted belonged to plaintiff and never did. Smith claimed title to only 443 acres of land inside of the Pendleton pasture.

V.

S. A. GREER testified that he had never been in joint possession with the other defendants; that he had never claimed any of the land except the land shown on Sketch (*a*) to be a part of section No. 90. When Smith put his fence across, presumably on the south part of section 90, he took in 80 acres of land belonging to section 90. This 80 acres was part of what had been inside of the Pendleton fence, belonging to plaintiff. Plaintiff's fence was around the pasture in use

by the plaintiff before Greer bought and he at first had turned the cattle into the pasture used by plaintiff. As contended by defendants, plaintiff's fence was not on the lines of sec's 27 & 91. He had decided to turn cattle into the enclosure, because if his Greer's theory of the lines was right the land was his and not plaintiff's and he had never claimed any of the land north of the north line of section 90 nor east of that line as shown by sketch (a). He had the same use of that part of plaintiff's land between the east line of section 90 and the east line of plaintiff's fence that he had of the balance of the land, but he had never claimed that part, and he had so informed plaintiff's agent. Smith and Greer had never jointly trespassed in taking possession of plaintiff's land. Both of them had turned cattle into the pasture, but they did not claim their cattle jointly nor did they claim the land jointly. S. A. Greer had run a fence from the southeast corner of section 28 over to the east line of plaintiff's pasture fence and joining to said fence, and thereby it gave to Smith all of
67 the land north of that point belonging to plaintiff, and to Greer the use of all of that land south of that point. There were only about 187 acres belonging to plaintiff inside of Greer's enclosure. Greer testified that he had never claimed jointly with Reagan, Lee or Smith, but all of them together claimed all of the land formerly in plaintiff's possession and inside of the pasture except the strip shown between the east line of sections 28, and 90 as shown on the sketch (a) and the east line of plaintiff's fence as shown in red on said sketch. Lee only claimed 96 acres; Reagan claimed 288 acres. This land was worth about $3.25 per acre. None of the parties claimed the land jointly but each claimed separate tracts. Smith had about 60 acres in cultivation on his tract which was formerly inside of the Pendleton fence, and its rental value was about $1.50 per acre per annum. It had been in Smith's possession for three years. The fence on the west line of plaintiff's pasture which had been placed there by Pendleton, Monteith and Hall, had been moved. Smith had moved a part of it.

VI.

REAGAN testified substantially as did Greer, except that he did not come to or take possession of the land until about 1902, and did not know who had moved the fence. At the time he bought the land, he did not know that there was any conflict between the plaintiff and himself. He found out there was a conflict, however, and he bought the land and then he moved the fence which was formerly where plaintiff claimed the North line of section No. 91, to be, down to where he claimed the south line of section No. 31 to be, and he put this fence on the south line of section No. 31 and thereby included inside of his enclosure a part of the land that was formerly inside of plaintiff's pasture and claimed by plaintiff as a part of section 27. Lee, who claimed a part of the land inside of this pasture as a part of section No. 32 did not disturb any of the fence. The fence
68 was placed on Lee's land by this defendant. Defendant Reagan testified that the value of the land was $3 per acre without the improvement. The fence was worth about $50 per mile. He

testified as to the rental value of Smith's land substantially as did the others. That part of the land in Smith's enclosure which was not in cultivation was used by Smith as grazing land and as a pasture for his cattle and horses. It was worth from 3c. to 5c. per acre per annum. Smith had possession for about three years.

VII.

Mr. MICKEY, local postmaster in Floyd County, testified that the value of the land claimed by Smith out of the pasture of plaintiff was about $3.25 per acre, and that all of the land inside of Smith's pasture, which was the land claimed by plaintiff and formerly in plaintiff's possession, was of about the value of $3.25 per acre. In addition to this, there was about a mile of fence on the tract of the value of $60. Smith had been in possession of the land for three years, and the value of the use and the occupation of the land had been $1.50 per acre per annum, during that time. The value of the grazing land in Smith's possession, of which there was about 600 acres out of the tract claimed by plaintiff was from 3c. to 5c. per acre per annum. Witness was interested in seeing that the lands were located as contended for by defendants, as he had a preemption which depended for its existence upon the defendants having their land correctly located. If their lands were not correctly located, they would go further west and it would cover witness' tract, and of course witness was interested in seeing that the defendants prevailed.

VIII.

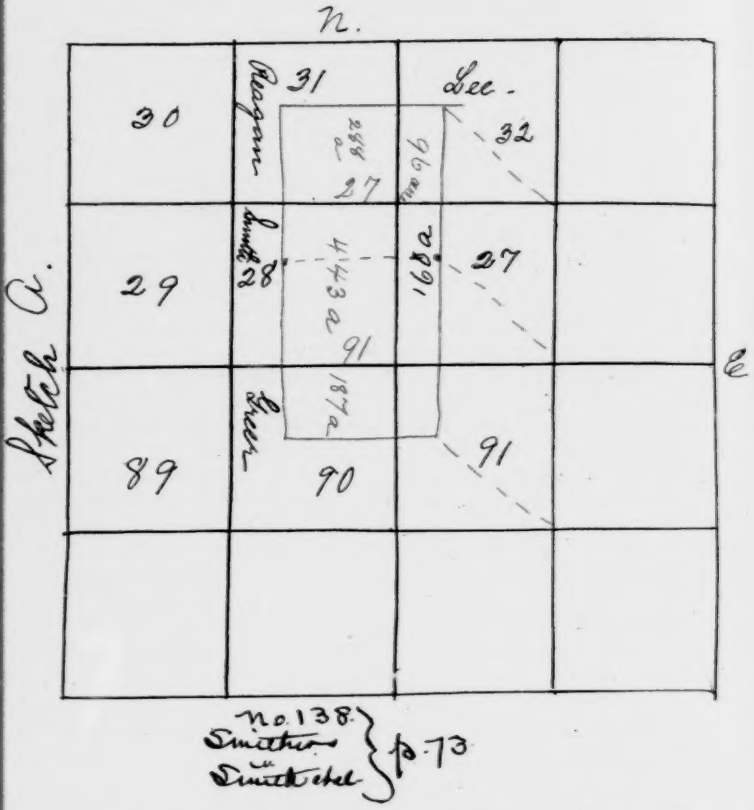
J. B. BARTLEY, witness for plaintiff, testified that he was the agent for Pendleton, Monteith and Hall, who fenced the 1280 acres of land in controversy in 1892. A substantial barbed wire fence with posts every thirty or forty feet apart was placed entirely around the 1280 acres, there being in all six miles of fencing, two miles on the
69 east, two on the west and a mile on the north and a mile on the south, and there were no cross fences. The land was fenced as a solid body and the fence was a substantial one. Witness leased this pasture from Massie, the agent of Pendleton, Montieth and Hall. Sometime after 1892 he used it a part of three years. Witness recognized Pendleton, Montieth and Hall as the owners. He used it for grazing cattle and horses. Witness looked after keeping up the fences, and kept them up while he had possession of the land. He kept them up by having a person to ride the line. Mr. Massie also used the land. Up to the time that Smith settled on what he claimed to be section 28, he never had much trouble in keeping the fences up. Up to that time he had at all times recognized Pendleton, Montieth and Hall as the owners. They afterwards sold to plaintiff. When Smith first settled on the land west of the Pendleton pasture (the land being called the Pendleton pasture and the Pendleton, Montieth and Hall pasture and plaintiff's pasture interchangeably), he tied his fence to the Pendleton fence and afterwards moved the Pendleton fence or a part of it some distance east, thereby increasing his enclosure and taking the land out of plaintiff's pasture. While

he Bartley was in possession, he claimed this pasture as being sections Nos. 27 and 91 and as belonging to the plaintiff or his vendors. He was on this land in the fall of 1904. The south fence had not been moved. All of the west string had been moved away from where it stood, as shown by the west red line on sketch (*a*) a portion of it was torn down and the wire was still on the ground. Smith and Greer had the use in common of all of the Pendleton pasture except that part which had been fenced by Reagan until Greer ran a fence through on what he claimed to be his north line. He tied his fence to the Pendleton fence, and then gave him the use of all of the land inside of the Pendleton pasture south of his fence and extending to the east line of the Pendleton pasture. Smith has now pos-
70 session of 640 acres of the Pendleton pasture extending from the east Pendleton fence to where the west Pendleton fence formerly stood and to Reagan's North line. This was the case at the time this suit was brought. Smith never told witness how much of the Pendleton Pasture he claimed. Greer told him how much he claimed. Greer told witness about how much of the land he claimed, that is showed him where his lines were but did not claim east of those lines although he had possession of the land east of that point. Witness was a tenant under Montieth, Pendleton and Hall. He did not ask any of the defendants why they had taken possession of the land except Greer. For sometime Smith and Greer had common use of the Pendleton Pasture before the division fence. Witness never saw any of the parties tearing down a fence. There were no improvements on the land claimed by the plaintiff as section- 27 and 91 except the six miles of fence. Witness was acquainted with the market value of the land in Floyd County. It was worth at least $3 per acre when the suit was brought. The land sued for was worth $4 per acre in February 1905. That was its market value. Grazing lands were worth 5¢ per acre. The rental value of the land of which Smith had taken possession formerly out of the Pendleton pasture was from 3½¢ to 5¢ per acre per annum. He had held it ever since 1901.

IX.

W. M. Massie testified substantially as did the witness Bartley. Massie was the agent for the plaintiff and before that time was the agent for Pendleton, Montieth and Hall, who conveyed to plaintiff the land sued for on the 19th day of Sept. 1901. At the time of the institution of this suit witness had informed plaintiff's attorney about how much of the land was claimed by each of the defendants and approximately where the lines run as claimed by defendant. He did not know whether the defendant's fences were on the line where they had run across fences through the pasture or not. But
71 he had told plaintiff's attorneys approximately how much they claimed. The land at the time of the institution of this suit was worth $3 per acre, and in February 1905, when the amended petition was filed, was worth $4 per acre. The fence was worth about $60 per mile, the lands in cultivation had a rental value of $1.50 per acre and Smith had had the use of 60 acres of cultivated land for about three years. The land which Smith had in possession belong-

(The red lines show the land as described and claimed by the plaintiff in his petition; the black lines show the land as claimed and described by the defendants, each separately and severally, as above stated.)



This plat was prepared by defendants counsel to illustrate the conflicts between the locations of the lands as claimed by plaintiffs and ascliamed by the defendants.

Endorsed as follows:No. 284. J.T.Smithers vs R.C.Reagan et al, Bill of Exceptions. Filed 7th day of July 1905, J.H.Finks, Clerk By J.B.Finks, Deputy.

ing to plaintiff, as contended by witness was 640 acres, and its value was $3 per acre. Smith, however, had informed witness that he did not claim the 160 acres of this land lying between the point indicated on sketch (*a*) as the east line of section 28, at the point in red shown to be the east line of sections 27 & 91 as claimed by plaintiff. These lands had been in possession of the defendants after ousting plaintiff for some three or four years last past.

In addition to the foregoing there were several witnesses who testified that the land in controversy was only worth $2.50 to 3.00 per acre at the time this suit was instituted in September 1903.

—.

Upon the trial of this cause the court held that the amount in controversy as between plaintiff and the defendant Smith was the value of such lands as were claimed by Smith in the pasture containing sections Nos. 27 and 91 and not the value of all of the land embraced in enclosure as shown by the red lines. That in determining the amount in controversy, the court would not include the 160 acres east of the east line of section 28 as claimed by Smith, although Smith was in possession of same.

XI.

The Court further held that he would not consider the value of the land at the time plaintiff's first amended petition was filed or at the time the suit was tried on defendant's pleas to the jurisdiction with the rental values of the lands up to that time as claimed by Smith,
but would confine himself to the value of the lands and the
72 rental values thereof claimed by Smith as said values existed
at the time of the institution of this suit.

The foregoing constitutes the testimony and statement of all the evidence introduced and offered upon the trial of this cause.

To which rulings of the court counsel for the plaintiff then and there duly excepted, and here now tenders this his bill of exceptions to the court, and the same is hereby allowed and approved and directed to be filed as a part of the record in this case.

EDWARD R. MEEK, *Judge.*

In Chambers at Ft. Worth, July 7th, 1905.

(Here follows plat marked page 73.)

74 *Certificate as to Jurisdiction.*

Entered April 8th, 1905.

From the Minutes of the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

APRIL 8TH, 1905.

The writ of error in this case is granted solely upon the question of jurisdiction, which, as set forth in the petition for writ of error, is hereby certified by the Circuit Court of the United States for the Northern District of Texas, the undersigned Judge presiding as Circuit Judge, to the Supreme Court of the United States and in order that the Supreme Court may properly determine the question of jurisdiction (no other question having been tried in the Circuit Court and the said cause having been finally disposed of under the defendants' pleas to the jurisdiction of the Circuit Court), it is ordered that a transcript of the record, containing the bills of exceptions, as in other cases, shall be duly authenticated and be sent to the Supreme Court of the United States with this certificate.

Dated this the 8th day of April 1905.

EDWARD R. MEEK,
U. S. District Judge.

From Minute Book 2, page 630.

75 *Writ of Error Bond.*

Filed September 11th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

No. 284.

J. T. SMITHERS
vs.
R. C. REAGAN ET AL.

Know all men by these presents: That we, J. T. Smithers as principal, and J. Z. Miller, Jr., and S. M. Ray, as sureties, are held and firmly bound unto R. C. Reagan, T. Smith, S. A. Greer, John Deven, C. F. Lee, A. M. Monteith, W. E. Hall, Geo. C. Monteith, James B. Daniels and Ella Daniels and Alexander Anderson, in the full sum of Five Hundred Dollars, to be paid to them, their heirs,

executors, or administrators, to which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and ours and each of our successors, representatives and assigns firmly by these presents.

Sealed with our seal- and dated this the 20th day of July 1905.

Whereas, the above named plaintiff has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause by the Circuit Court of the United States for the Northern District of Texas, which judgment was rendered on March 31st 1905, dismissing said cause for want of jurisdiction.

Now, Therefore, the condition of this obligation is such that if the above named J. T. Smithers shall prosecute his writ of error to effect and shall answer all costs and damages that may be assessed against him, if he fails to make good his plea, then the above obligation to be void, otherwise, to remain in full force and virtue.

Given under our hands the date aforesaid.

J. T. SMITHERS,
Principal.
J. Z. MILLER, JR.,
S. M. MAY, *Sureties.*

Approved:
EDWARD R. MEEK, *Judge.*

76 THE STATE OF TEXAS, *County of Bell:*

I, Jno. G. McKay, Clerk of the District Court in and for said County, do hereby certify that J. Z. Miller, Jr., and S. M. Ray, whose genuine signature- appear signed to the annexed bond are, in my opinion, good and ample security for the amount therein specified; that each of them have property in said County subject to execution of a larger amount, and that if said bond was offered to me for approval the same would be accepted and approved.

Witness my hand and seal, at Belton, this 20th day of July 1905.

JNO. G. McKAY,
[SEAL.] *Clerk Dist. Court, Bell County.*

The foregoing has the following endorsement, to-wit:—
No. 284 L. J. T. Smithers *vs.* R. C. Reagan *et al.* Writ of error bond. Filed 11th day of Sept. 1905. J. H. Finks, Clerk By J. B. Finks, Deputy.

77 THE UNITED STATES OF AMERICA:

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a certain cause in the said Circuit Court before you or some of you, between J. T. Smithers, Plaintiff in Error, and T. Smith, S. A. Greer, R. C. Reagan, C. F. Lee, James B. Daniels, Ella Daniels, George C. Pendleton, A. M. Monteith, and W. E. Hall,

defendants in error, in Cause No. 284, on the common law docket of the Circuit Court of the United States for the Northern District of Texas at Fort Worth, a manifest error hath happened, to the great damage of said J. T. Smithers, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been committed, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ so that you have the same at the City of Washington on the second Monday in October, 1905, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States the 11th day of September, in the year of our Lord One Thousand Nine Hundred and Five.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Ft. Worth.]

J. H. FINKS,
Clerk of the U. S. Circuit Court
for the Northern District of Texas,
By J. B. FINKS, *Deputy.*

78 *The Answer of the Judges of the Circuit Court of the United States for the Northern District of Texas.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the Supreme Court of the United States within mentioned, at the date and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

Done by the Court.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Ft. Worth.]

J. H. FINKS,
Clerk of the said Circuit Court,
By J. B. FINKS, *Dep.*

78½ [Endorsed:] No. 284. C. L. J. T. Smithers *vs.* R. C. Reagan *et al.* Writ of Error. Filed 11th day of Sept. 1905. J. H. Finks, Clerk. By J. B. Finks, Deputy.

79 The President of the United States of America to T. Smith, S. A. Greer, R. C. Reagan, C. F. Lee, J. B. Daniels, and Ella Daniels, A. M. Monteith, W. E. Hall, and Geo. C. Pendleton, Greeting:—

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington on the 9th day of October, 1905, pursuant to a writ of error allowed by the Circuit Court of the United States for the Northern District of Texas, in a cause tried and determined at the March, 1905 term of the said Circuit Court, being Cause No. 284 C. L., wherein J. T. Smithers is plaintiff and yourselves are defendants, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States this the 11th day of September, in the year of our Lord One Thousand Nine Hundred and Five.

EDWARD R. MEEK,
United States District Judge, Presiding as Circuit Judge for the Northern District of Texas.

80 [Endorsed:] 284 L. J. T. Smithers *vs.* R. C. Reagan *et al.* Citation in Error. Filed 11th day of Sept. 1905. J. H. Finks, Clerk. By J. B. Finks, Deputy.

81 *Acceptance of Service by R. C. Reagan, T. Smith, S. A. Greer, and C. F. Lee.*

Filed September 11th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

J. T. SMITHERS, Plaintiff in Error,
vs.
R. C. REAGAN ET AL., Defendants in Error.

We the undersigned, R. C. Reagan, T. Smith, C. F. Lee and S. A. Greer, acting by and through our duly authorized attorney, Sam J. Hunter, do hereby waive the service upon us of citation in error, and do hereby accept service of such citation upon us, so that the effect shall be the same as though the citation in error, issued by the Hon. Edward R. Meek, presiding as Circuit Judge, were duly served upon us at the date of signing this waiver. The citation hereby waived is the one directing us to appear before the Supreme Court of the United States to show cause why the above styled cause pending on writ of error in said court from the Circuit Court of the United States for the Northern District of Texas at Fort Worth should not be reversed.

Witness our hands this 11th day of September A. D. 1905.

SAM J. HUNTER,
Attorney for Defendants in Error, R. C. Reagan, T. Smith, S. A. Greer, and C. F. Lee.

The foregoing has the following endorsement, to-wit:—
284 L. J. T. Smithers *vs.* R. C. Reagan *et al.* Acceptance of service of citation in error. Filed 11th day of Sept. 1905. J. H. Finks, Clerk By J. B. Finks, Deputy.

82 *Acceptance of Service by A. M. Monteith, Geo. C. Pendleton, and W. E. Hall.*

Filed September 11th, 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

J. T. SMITHER, Plaintiff in Error,
vs.
R. C. REAGAN ET AL., Defendants in Error.

We, the undersigned, A. M. Monteith, Geo. C. Pendleton and W. E. Hall, do hereby waive the service of citation in error upon us and hereby accept service of said citation, so that the effect shall be the same as though the citation in error were duly served upon us as of the date of signing this waiver. The citation hereby waived is one directing us to appear before the Supreme Court of the United States to show cause why the above styled cause pending on writ of error in said court from the Circuit Court of the United States for the Northern District of Texas at Fort Worth should not be reversed.
Witness our hands this 11th day of Sept. 1905.

A. M. MONTEITH,
Attorney for Self and Others Above Named, Defendants in Error.

The foregoing has the following endorsement, to-wit:—
No. 284 L. J. T. Smithers *vs.* R. C. Reagan *et al.* Acceptance of service. Filed 11th day of Sept 1905. J. H. Finks, Clerk By J. B. Finks, Deputy.

83 *Acceptance of Service by James B. and Ella Daniels.*

Filed September 11th 1905.

In the Circuit Court of the United States for the Northern District of Texas, at Fort Worth.

J. T. SMITHERS, Plaintiff in Error,
vs.
R. C. REAGAN ET AL., Defedants in Error.

We, the undersigned, James B. Daniels and Ella Daniels, do hereby waive the service of citation in error upon us and hereby accept service of said citation, so that the effect shall be the same as though citation in error were duly served upon us as of the date of

signing this waiver. The citation hereby waived is the one directing us to appear before the Supreme Court of the United States to show cause why the above styled cause pending on writ of error in said court from the Circuit Court of the United States for the Northern District of Texas at Fort Worth should not be reversed.

Witness our hands this 11th day of September 1905.

WM. HARTLEY PUGH,
Attorney for Defendants in Error.

The foregoing has the following endorsement, to-wit:—

284 L. J. T. Smithers *vs.* R. C. Reagan *et al.* Acceptance of service. Filed 11th day of Sept. 1905. J. H. Finks, Clerk By J. B. Finks, Deputy.

84 *Clerk's Certificate.*

I, J. H. Finks, Clerk of the Circuit Court of the United States, in the Fifth Circuit and Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record, bill of exceptions, assignments of error, and all proceedings had in cause No. 284, wherein J. T. Smithers is plaintiff and R. C. Reagan *et al.* are defendants, except that the original writ of error and original citation in error are included therein, instead of copies thereof, as fully as the same remain on file and of record in my office at Fort Worth, Texas.

Witness my hand officially, and the seal of said Circuit Court of the United States for the Northern District of Texas, at Fort Worth, Texas, this the 30th day of September, and of American Independence the 129th year.

[The Seal of the U. S. Circuit Court, Northern Dist., Texas, Ft. Worth.]

J. H. FINKS,
Clerk of said Court,
By J. B. FINKS,
Deputy.

Endorsed on cover: File No. 19,943. N. Texas, C. C. U. S. Term No. 138. J. T. Smithers, plaintiff in error, *vs.* T. Smith, S. A. Greer, R. C. Reagan, *et al.* Filed October 24, 1905. File No. 19,943.

FILE COPY.

Office Supreme Court, U.
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JAMES H. McKENNEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1906.

No. 138.

J. T. SMITHERS, *Plaintiff in Error,*

vs.

T. SMITH, ET AL., *Defendants in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.
(19,943.)

BRIEF OF PLAINTIFF IN ERROR.

DAVID T. ROMAN,
FRANK E. DYCUS,
Attorneys for Plaintiff in Error.

B. H. TAYLOR, Printer, Fort Worth, Texas

IN THE
Supreme Court of the United States

OCTOBER TERM, 1906.

No. 138.

J. T. SMITHERS, *Plaintiff in Error,*

vs.

T. SMITH, ET AL., *Defendants in Error.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.
(19,943.)

BRIEF OF PLAINTIFF IN ERROR.

ABSTRACT OR STATEMENT OF THE CASE.

On Septembc 2th, 1903, J. T. Smithers, plaintiff in the court below, filed his original petition in the Circuit Court of the United States for the Northern District of Texas at Fort Worth, the petition being in the ordinary form of the Texas action of trespass to try title, therein claiming to have been in possession of and to be the owner, by title in fee simple, of 1,280 acres of land described here for the sake of brevity as Sections Nos. 27 and 91, fully described in

the petition both by field notes as given in the patents and by physical objects found on the ground. (Record, pp. 2 and 3.) Messrs. Smith, Greer, Deven and Reagan were made defendants under allegations that they had wrongfully entered upon the land and ejected plaintiff therefrom on January 15th, 1902, and that they withheld possession of the land from plaintiff. The two surveys of land were in one body, making a parolelogram one mile wide and two miles long. (Record, p. 2.) The tract was alleged to be of the value of $5,000.00. The rental value of the property $150.00 per annum, and plaintiff averred that he had been damaged in the sum of $2,000.00 by reason of his ouster by said defendants and the removal and destruction by them of certain fences on and around the land, etc. (Rec., p. 4.) Plaintiff averred that he was a resident and citizen of the State of New York, and that said defendants were each and all citizens and residents of Floyd County in the Northern District of Texas. Messrs. Montieth, Pendleton and Hall, residents and citizens of Bell County, Texas (Rec., p. 1), Alexander Anderson a resident and citizen of Pike County, Illinois, and J. B. and Ella Daniel residents and citizens of the State of Kentucky, were made parties defendant, on the ground that they were warrantors of plaintiff in conveyances made by them to said lands under which plaintiff held, it being averred that the entry of the trespassing defendants gave to plaintiff a cause of action against his warrantors. The facts showing payment of purchase money to the warrantors, their conveyances and covenants of warranty being fully pleaded. (Rec., pp. 2 and 3.) The references here are to the printed record in each instance.

An acceptance of service was filed by Montieth Pendleton and Hall. Citations were issued and were duly served upon all of the defendants except Alexander Anderson and John Deven. (Rec., p. 6.) No service was ever had upon Anderson or Deven, nor did they ever appear or answer. (Rec., p. 7.) Smith, Greer and Reagan appeared and filed separate answers, each disclaiming title to all of the land except a specific tract described by metes and bounds in his answer (Rec., pp. 8 and 9) as to which each pleaded that the land claimed by him was of less value than $2,000; that the amount in dispute between himself and the plain-

tiff did not exceed $2,000.00; that he did not claim any of the land jointly with his co-defendants but separately, and that each defendant claimed a separate tract, of value less than $2,000.00. Each denied a joint trespass; alleged that plaintiff's allegation of a joint trespass was fraudulent, and pleaded that the court had no jurisdiction of the case. (Rec., pp. 8 and 9.) February 21, 1905, plaintiff filed his first amended original petition in lieu of his said original petition, the only change made being that C. F. Lee, a resident and citizen of Jack County, Texas, was made a party to the suit under an allegation that he jointly with the other defendants had taken possession of plaintiff's land, had ousted plaintiff from the land and withheld possession of the land from plaintiff since January 15, 1902. (Rec., pp. 23, 24 and 25.) Plaintiff pleaded that the land *now* exceeds in value $5,000.00 (Rec., p. 25); that his damages were $2,000.00 (Rec., p. 27); that defendants had destroyed or removed the improvements on the land; that the rental value of the land was $150.00 per annum. (Rec., p. 27.) It was further averred that the object of the suit was to recover the land, the damages, rents, etc., and to fix and establish the boundaries to sections 27 and 91. (Rec., p. 25.) The petition contained all other allegations set forth in the original petition ,and plaintiff pleaded that he had also acquired title through adverse possession of the land under the statutes of limitations of Texas of three and five years. (Rec., p. 25.) C. F. Lee, having been duly served with citation, appeared and filed his plea to the jurisdiction of the court, disclaiming title to all of the land sued for except a small tract described by him by metes and bounds, alleging its value at less than $2,000.00, and averring that the defendants each claimed a separate tract; that they did not claim jointly and that the allegation of a joint trespass was fraudulently made. (Rec., p. 28.)

The defendants moved for a severance, but this was denied, and March 31st, 1905, the cause was submitted to the court upon the separate pleas of the defendants Smith, Greer, Reagan and Lee to the jurisdiction of the court, and the pleas sustained, the cause dismissed for want of jurisdiction, and all costs adjudged against the plaintiff. (Rec., p. 37.)

Thereafter on April 8th, 1905, the plaintiff filed his assignment of errors, and his petitioin for a writ of error. (Rec., pp. 39 and 40.) The petition was allowed by the court, the bond fixed (Rec., p. 40) and a certificate made by the court that the cause was dismissed for want of jurisdiction, and the writ of error granted to this court solely on the question of the jurisdiction of the Circuit Court. (Rec., p. 48.) Plaintiff executed and caused the writ of error bond to be filed (Rec., pp. 48 and 49), the same having been duly approved by the court. (Rec., p. 49.)

A bill of exceptions was prepared, signed and allowed by the court, and filed. (Rec., p. 41.) The citation in error duly issued, service accepted by the defendants. (Rec., pp. 51 and 52.) The writ of error duly issued and returned. (Rec., p. 49.) The record prepared and filed in this court, and the action of the Circuit Court in dismissing the case for want of jurisdiction is before this Honorable Court for review and correction.

POINTS RELIED UPON BY PLAINTIFF IN ERROR FOR A REVERSAL OF THE JUDGMENT DISMISSING THE CASE FOR WANT OF JURISDICTION.

(1) The value of the land sued for exceeded the sum of $2,000.00. The rents on the lands, with damages exceeded the sum of $2,000.00 in value besides the interest and costs.

(2) The action was brought to fix the boundaries to sections Nos. 27 and 91, being one tract or body of land containing 1,280 acres, of the value of $3,840.00, when the suit was brought, and formerly enclosed and used by plaintiff, but claimed by defendants as conflicting with the boundaries of their tracts and now in their possession.

(3) On February 21st, 1905, the date of the filing of plaintiffs first amended original petition, the land sued for exceeded the value of $5,000, and was, to-wit: of the value of $4.00 per acre, besides rents and damages claimed, exceeding $2,000.00; the court had jurisdiction at that time, and it is immaterial when its jurisdictioin was acquired.

(4) At the date of the trial on the plea to the jurisdiction, the amount in dispute and diversity of citizenship of the parties, gave the lower court jurisdiction.

(5) The trial court erroneously refused to consider the value of the land with rents and damages at the date plaintiff's amended petition was filed, or at the time of the trial on the pleas to the jurisdiction.

(6) The evidence undisputably shows that defendants Greer and Smith were joint trespassers and in common use of lands sued for by plaintiffs, which, with rents and damages, exceeded the sum or value of $2,000.00.

(7) All of the defendants were properly joined in one action, and the court erred in dismissing the case.

BRIEF OF ARGUMENT.

The assignments made and filed in the trial court, with the petition for writ of error, will be now taken up and discussed in their order.

FIRST ERROR SPECIFIED.

(First Assignment of Error in the Record.)

The Circuit Court erred in holding that it did not have jurisdiction of this cause, because it was shown that there was the necessary diversity of citizenship between plaintiff and the defendants, and that the value of the land in controversy was $3,840.00, exclusive of the rental value and damages sued for, and that plaintiff had a right to join all of the defendants in one action inasmuch as the issue in the cause was the true location of the boundary lines of surveys Nos. 27 and 91, being the entire 1,280 acres in controversy. (Rec., p. 39.)

STATEMENT FROM THE RECORD.

The land sued for was of the value of $4.00 per acre on February 21st, 1905, when the plaintiff's amended petition was filed. That was its market value. Both Massie and Bartley so testified, and no witness denied it. (Rec., p. 46.) The rental value of sixty acres, cultivated by Smith

and in his possession, was $1.50 per acre per annum for the three years it had been used by him, and 3½ to 5c per acre per annum for the balance of the land. Plaintiff Smithers, it was agreed, owned sections 27 and 91, patented as containing 1,280 acres of land. (Rec., p. 42.) Plaintiff's grantors, Montieth, Pendleton and Hall fenced the 1,280 acres in controversy in 1892 with a substantial fence, claiming it to be sections 27 and 91. (Rec., p. 45.) There was six miles of fencing, one mile on the north and south, respectively, and two miles both on the east and west. (Rec., p. 45.) Massie and Bartley each used the land as tenants of Montieth, Pendleton and Hall and plaintiff (to whom the later conveyed the land in September, 1902) after 1892 for some years. (Rec., pp. 45 and 46.) Smith, one of the defendants, who occupied land west of the plaintiff's enclosure, finally moved plaintiff's fence further east so as to take into his own enclosure part of plaintiff's land. (Rec., p. 45.) Defendants Smith and Greer had at first the use in common of all of the land in plaintiff's enclosure, except of a part which Reagan fenced off. (Rec., p. 46.) Greer afterwards ran a fence through the enclosure, fencing off about 187 acres of the land formerly in plaintiff's enclosure. (Rec., p. 46.) Also see sketch between pages 46 and 47, showing, by lines in red, the land fenced by plaintiff and of which he was dispossessed. At the time of the trial there was inside of Smith's enclosure 720 acres of land formerly embraced in plaintiff's enclosure, of which he claimed title. Smith only claimed title to 600 acres of land, eighty acres of the land inside of his fence and a part of the land claimed by plaintiff was claimed by defendant Greer as a part of his tract, and he promised to pay Greer rent for it, and did pay it. He did not claim the tract of about 160 acres situated east of the east line of section 28 as claimed by him, and the eastern red line of sections 27 and 91 as shown on the sketch. (Rec., p. 43.) Both Smith and Greer turned cattle into plaintiff's enclosure and used it in common till March, 1903, when Greer fenced off all the land claimed by him in plaintiff's enclosure except eighty acres, which he leased to Smith. (Rec., p. 43.) At the time suit was filed Smith claimed title to 443 acres of the land fenced by Montieth, Pendleton and Hall, Reagan 288 acres, Greer 187 acres and

Lee 96 acres, making 1,034 acres. (Sketch, Rec., p. 47.) It was agreed by the parties that the purpose of the suit was to fix and establish the boundaries of sections Nos. 27 and 91. (Rec., p. 42.) That plaintiff was the owner, by title in fee, of surveys Nos. 27 and 91. Defendant Smith was the owner of survey No. 28, Greer of survey No. 90, Reagan the owner of survey No. 31, and Lee the owner of survey No. 32, all by title in fee simple. (Rec., p. 42.) Witness Massie testified that he told the plaintiff's attorneys about how much of the plaintiff's land each defendant claimed, he did not know that the defendants' fences were on the lines claimed by them, but he could approximate how much the defendants' claimed. (Rec., p. 46.) Smith and Greer and Reagan each denied that they acted jointly in taking possession of plaintiff's land. (Rec., p. 44.) Some of the witnesses testified that the land was worth from $2.50 to $3.00 per acre when the suit was brought. (Rec., p. 47.) Reagan moved plaintiff's north and a portion of the west fence south and east and took possession of 288 acres of land in plaintiff's possession. The fence around plaintiff's pasture and appropriated and moved by defendants was worth $50.00 per mile. (Rec., p. 45.) The court, who heard the evidence, held:

(1) That he would not consider the value of all the land in Smith's possession, which was formerly in plaintiff's possession, but the value only of such land as Smith claimed. (Rec., p. 47.)

(2) That he would not consider the value of the land at the time of the trial or at the time plaintiff's amended petition was filed, but would limit his consideration to the value of the land and the rental value at the time the suit was filed. He therefore found that the matter in dispute was less than $2,000.00, and dismissed the suit. (Rec., p. 47.)

FIRST PROPOSITION OF LAW THEREUNDER.

A joint trespass by the defendants upon the enclosed lands of the plaintiff authorized an action by the plaintiff to join all of the defendants in one suit.

AUTHORITIES.

Greer vs. Mezes, 24 How., 268, 16 L., 663.
L. & N. Ry. Co. vs. Smith, (C. C. A.), 128 Fed., 5.
McGuire vs. Pensacola City, 105, Fed., 679.
1 Pom. Eq. Jur., Secs. 145-273.

SECOND PROPOSITION.

The right to fix and establish the boundaries of the entire 1,280 acres being the object of the suit, as to each and all of the defendants, the value of the entire tract is the matter in dispute.

AUTHORITIES.

L. & N. Ry. Co. vs. Smith, 128 Fed., 5.
Munsey vs. Matfield (Tex.), 40 S. W., 346.

SECOND ERROR SPECIFIED.

(Second Assignment of Error in the Record.)

The said Circuit Court erred in holding that it did not have jurisdiction of the suit as between the plaintiff and the defendants, Smith and Greer, for the reason that they were joint trespassers upon a part of plaintiff's land, which exceeded the sum of $2.000.00, and there being the necessary diversity of citizenship and the amount in controversy exceeding the sum of $2,000.00 the court should have taken jurisdiction of said suit. (Rec., p. 39.)

PROPOSITION OF LAW THEREUNDER.

A disclaimer by the defendants, or either of them, does not take away the jurisdiction of the court, which is fixed by the claim of the demandant.

AUTHORITIES.

Green vs. Liter, 8 Cranch, 230, 3 L. Ed., 545.
Way vs. Clay, 140 Fed., 355.
McGuire vs. Pensacola City Co., 105 Fed., 679.

SECOND PROPOSITION THEREUNDER.

Where the Circuit Court dismisses a case for lack of jurisdictional value, the evidence on which that conclusion is reached must be shown of record to a legal certainty. The lack of jurisdiction must clearly appear.

AUTHORITIES.

Barry vs. Edmunds, 116 U. S., 553.
Wetmore vs. Reimer, 169 U. S., 115, 42 L., 683.
Waterworks vs. Ryan, 181 U. S., 409, 45 L., 937.
Gage vs. Pumpelly, 103, U. S., 164, 21 L., 668.

THIRD PROPOSITION THEREUNDER.

The Supreme Court will look into the facts, review the evidence and determine whether it supports the action of the Circuit Court in dismissing the case for lack of jurisdiction.

AUTHORITIES.

Wetmore vs. Reimer, 169 U. S., 115, 42 L., 683.
Steglider vs. McGusten, 198 U. S., 140, 49 L., 986.

THIRD ERROR SPECIFIED.

(Third Assignment of Error in the Record.)

The court erred in holding that it could not take into consideration the value of the land in controversy as between the plaintiff and the defendant Smith at the time the plaintiff's amended petition was filed, but was confined to the value of the land and the rental value thereof as the same existed at the time of the institution of the suit. (Rec., p. 39.)

FIRST PROPOSITION THEREUNDER.

The jurisdiction of the Circuit Court is fixed by the matter in dispute at the date of the decree rendered in that court.

AUTHORITIES.

Knapp vs. Banks, 2 How., 74, 11 L., 184.
Keller vs. Ashford, 133 U. S., 610, 33 L., 670.
Mass. Benefit Ass'n vs. Miles, 137 U. S., 689, 34 L., 835.

SECOND PROPOSITION THEREUNDER.

It is sufficient to give jurisdiction to the court, that it had jurisdiction at the time the decree was rendered, and it is immaterial how long before that time its jurisdiction had attached.

AUTHORITIES.

Washer vs. Bullitt Co., 110 U. S., 558, 28 L.
Pacific Ry. Co. vs. Ketchem, 101 U. S., 289, 25 L., 936.
First Nat'l Bank vs. Bedford Tr. Co., 80 Fed., 572.

THIRD PROPOSITION THEREUNDER.

In the action of trespass to try title in Texas, the plaintiff may, by amendment, set up a new cause of action or a new title inquired by him after the suit was brought. The cause thereupon proceeds as a new suit based on such amendment.

AUTHORITIES.

Collins vs. Ballew, 72 Tex., 330.
Ballard vs. Carmichael, 83 Tex., 359.
Sinsheimer vs. Kahn, 24 S. W., 535.
Schmidt vs. Huff, 28 S. W., 1055.

FOURTH ERROR SPECIFIED.

(Fourth Assignment of Error in the Record.)

The court erred in holding that it had no jurisdiction of this cause, because the uncontroverted evidence shows that the land in controversy was of the value of $3.00 per acre; that the damages claimed were $2,000.00; that there was 1,280 acres in controversy between the plaintiff and the defendants, and the amount involved far exceeded the jurisdictional value of the court, and the defendants had such

interest as made them jointly suable by the plaintiff. (Rec., p. 39.)

FIRST PROPOSITION THEREUNDER.

The disclaimer by the defendants of lands found in their possession did not take away the jurisdiction of the court, provided said lands exceeded in value, with the damages and rents, the sum of $2,000.

AUTHORITIES.

Green vs. Liter, 8 Cranch, 229.
Galbreath vs. Howard, 32 S. W., 808.
Wooters vs. Hall, 67 Texas, 513.
Dykes vs. Miller, 24 Tex., 422.
Capt. vs. Stubbs, 68 Tex., 225.
Tate vs. Wyatt, 77 Tex., 412.

SECOND PROPOSITION THEREUNDER.

The jurisdiction of the court as between plaintiff and Smith and Greer is not to be determined by the value of the right of the present possession but by the value of the entire 720 acres of the land in controversy now in Smith's possession.

AUTHORITIES.

Black vs. Jackson, 177 U. S., 335.

ARGUMENT.

No issue was raised in the trial court by the pleas to the jurisdiction urged by the defendants, that there was not the necessary diversity of citizenship of the parties or that the value of the whole tract claimed by plaintiff and which he possessed up to the time he was ejected by defendants did not exceed in value the sum of two thousand dollars, added to which was the value of the rents and damages. The assault upon the jurisdiction was based upon the contention that the defendants each claimed a separate tract of the land, and that the value of each tract alone was the test

of the court's jurisdiction, and the further contention that defendants had not been guilty of a joint trespass on the land and that the allegation of joint trespass had been fraudulently made.

The following jurisdictional allegations were made by plaintiff in his pleading:

(1) That plaintiff was a resident and citizen of the State of New York and defendants were residents and citizens of the State of Texas.

(2) That the value of the 1,280 acres sued for was $5,000.00; that plaintiff was entitled to damages, growing out of ejection and dispossession of property, in the sum of $2,000.00; that the rents from July 15th, 1902, to the time of trial, March, 1905, were $1.50 per acre, or $450.00; total, $7,450.00.

The uncontradicted evidence disclosed:

(1) That plaintiff was the owner of the 1,280 acres known as surveys Nos. 27 and 91, claimed by him to cover the land in controversy. (Rec., p. 42.)

(2) That plaintiff's vendors, Montieth, Pendleton and Hall, enclosed the land in controversy by a substantial fence, and took possession and used the land, claiming it to be surveys Nos. 27 and 91. After plaintiff's purchase his fences were torn down and removed by Smith, and plaintiff was dispossessed of the land by Smith and Reagan. At least they turned their stock in the enclosure and admitted that they took and had common use of the pasture till Greer fenced off a part of it. (Rec., pp. 43 and 44.) Reagan fenced off a part and Lee the balance, so that all the fencing owned by plaintiff surrounding the land in controversy on the north and west was removed by Smith, Greer and Reagan. (Rec., p. 44.)

(3) The value of the land when the suit was brought in September, 1903, was, according to the testimony of some of the defendants' witnesses, only $2.50 to $3.00 per acre. (Rec., p. 47.) Defendant Reagan gave its value as $3.00 per acre, witness Mickey gave it at $3.25 per acre, defendant Greer at $3.25 per acre. Witnesses Bartley (Rec., p. 45)

and Massie (Rec., p. 46) testified that the value of the land, when the amended petition was filed, was $4.00 per acre.

(4) The rental value of the sixty acres of land in cultivation, being part of the land sued for, was admitted by defendants to be $1.50 per acre per annum, which, for three years, would make $270.00. (Rec., p. 45.)

(5) Smith had possession of 720 acres of the land claimed by plaintiff and at $3.00 per acre this would give a total of $2,160.00, and of this land Smith denied that he had ever claimed 160 acres, and stated that Greer claimed eighty acres out of the tract, and that he was paying rent to Greer on the tract. (Rec., p. 43.)

(4) The rental value of the land, except the sixty acres in cultivation, was from 3½c to 5c per acre (say 1,200 acres at 5c per acre, $60.00 per annum), or for three years $180.00; three miles of fence at $50.00 per mile.

To sum up—

Value of the 1,280 acres when amended petition was filed	$5,120
Rental value of grazing land	180
Rental value of farm, 60 acres	270
Fencing	150
Total	$5,720

Or should we fix the value of the land at the time the suit was brought this would reduce the amount only $1,280.00, leaving the remainder, $4,440, as its then value.

Now it was agreed that the object of the suit was to fix and establish the boundaries of the entire 1,280 acres, hence we say the judgment as between plaintiff and one of the defendants would necessarily be the same as to all of the others.

In a suit to establish boundaries to a specific tract of land, all persons claiming any part of the tract are necessary parties.

In Greer vs. Mezes, 24 How., 268, 29 L. Ed., 663, complaint was made by defendants that a judgment had been

rendered against the defendants jointly, although they had severed in their answers.

Mr. Justice Grier, speaking for this court, stated that while in an action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels in possession of several defendants each claiming for himself, but that he was not bound to bring a separate action against several trespasses on his separate, single and distinct tenement or parcel of land. Adding, as to plaintiff, all of the defendants are trespassers. The opinion recognizes the right of the defendants to separately answer and to have a separate trial where each defendant claims separately in order that he should not be made liable for costs unconnected with his separate litigation. Now there can be no question that the land was situated in a single enclosed tract a mile wide and two miles long. Why should the jurisdiction be ousted because the trespassing defendants have parcelled out among themselves the lands in plaintiff's possession? If this is the law it would follow in every case, that where a plaintiff was dispossessed of his premises of greater value than $2,000.00, he being a citizen of a different State from that in which defendants resided and had citizenship, the jurisdiction of the Federal Court could be ousted by defendants separately claiming separate tracts each of itself below the jurisdictional value.

An action brought to fix and settle boundaries is governed by a somewhat different rule than that which ordinarily applies to the action of ejectment. For not only is the title and right to possession usually involved, but there is in addition a doubt and uncertainty as to the true location on the ground of the lines and corners of the land in controversy and the rule as to necessary parties as limited in ejectment cases has no application to a boundary case.

A case in point is that of Muncey vs. Matfield, 40 S. W., 346, decided by the Court of Civil Appeals of Texas.

There Matfield sued Muncey who owned a survey on one side of his own survey, and Cotten who owned a survey on the other side; in other words, plaintiff claiming the Metzer survey, sued the land owners on both sides of his survey, seeking to establish the lines of his own survey. The

defendants pleaded that they were improperly joined because Cotten had no interest in the land claimed by Muncey, and the latter had no interest in the land claimed by Cotten. They were not even adjoining owners, the tract of plaintiff intervening between those claimed by Muncey and Cotten. Plaintiff Matfield, it must be observed, did not claim to own both the tract claimed by Muncey and that of Cotten, but believed that he was entitled to the land claimed by one or the other of them, and was in doubt as to where his lines should be located. The court held that there was no error in allowing the plaintiff to fully settle his boundaries in one action, saying, "We think this practice permissible. The plaintiff was in doubt as to where were the true boundary lines of his survey on each side and he had the right to settle and establish in one controversy the boundary lines of his land and to bring into that suit all parties who may be claiming adversely to him."

In Louisville & N. Ry. Co. vs. Smith, 128 Fed., 5, the Circuit Court of Appeals of the Fifth Circuit had before it the questions of jurisdictional value and misjoinder. That action was equitable in its nature, plaintiff joining in its bill all parties who were interfering with the proper use of its rights-of-way. Each defendant was claiming the right to cultivate the land claimed by him up to the end of the defendant's cross ties, and prevented plaintiff from using any of the balance of the land. The railway track passed through separate tracts belonging to the defendants in severalty.

It was claimed by the defendants that plaintiff could not give to the court jurisdiction by aggregating the value of the several parcels over which the right of way extended, and that there was a misjoinder of parties. In disposing of this contention Circuit Judge Shelby said in part:

"The rule, we think, is plain that when the matter in litigation is entire in itself and does not consist of separate things having no connection with each other it is not necessary that each defendant should have an interest in the suit co-extensive with the claim set up in this bill. He may have an interest in a part of the matter in litigation instead of the whole. There can be no reason why one one complain-

ant who has the same right against a number of persons—that right being such that it confers equity jurisdiction and may not have that right determined as to all the parties interested by one suit. The plaintiff's claim is an entirety. The right claimed is exactly the same as to each defendant. All the defendants are interfering in the same manner with the same right-of-way. As the case is one on the averments of the bill within the jurisdiction of a court of equity, there can be no reason for requiring the defendants to file fifteen separate bills—one against each defendant. It is no objection that the several defendants each have a right to make a separate defense, provided complainant's assertion of right is the same against each, and there is only one general question that pervades the whole case."

While the last case cited was an equity case, we conceive that there is no difficulty in applying the rule to an action at law to fix and establish boundaries and recover the land, for there is but one general question to be determined, and as to the plaintiff the defendants are joint trespassers upon his single enclosed tract, and a recovery as to one defendant would be so as to all.

Plaintiff rightfully joined his warrantors on their covenants of warranty. (McCreary vs. Douglass, 5 Tex. Civ. App., 276, 24 S. W., 367; Kirby vs. Estell, 75 Tex., 486; Norton vs. Collins, 1 Tex. Civ. App., 276.) Assuming that the defendants were joint trespassers they were properly joined in one suit.

In McGuire vs. Pensacola City Co., 105 Fed., 679, the Circuit Court of Appeals for the Fifth Circuit approved the rule in Greer vs. Mezes, supra, saying:

"If the defendants are trespassers, having obtained possession by force and violence, as alleged, they may all be joined in one action of ejectment."

Appropos to the rule cited, we call attention to the fact that the plaintiff was dispossessed of his enclosed lands by force and violence; that defendants took possession and removed the fencing, each man taking possession of a specific tract, but for a time using all the land in common."

The jurisdiction of the court is not ousted because the

defendant disclaims a part of the land sued for, so that the amount claimed by him is of less value than $2,000.

In Green vs. Liter, 8 Cranch, 230, 3 L. Ed., 545, the plaintiff sued to recover a large tract of land of value necessary to give jurisdiction. The judges of the Circuit Court being divided in opinion certified to the Supreme Court the following among other questions:

"Has the Circuit Court jurisdiction in a writ of right where the land claimed by the demandant is above the value of $500.00 but the tenement held by the tenant is of less value than $500.00?"

Mr. Justice Story answered without equivocation or argument as follows:

"As to the first question, we are satisfied that the Circuit Court had jurisdiction of the case. Taking the 11th and 20th sections of the judicial act of 1789, ch. 20, in connection, it is clear that the jurisdiction attaches where the property demanded exceeds $500 in value, and if, upon the trial the demandant recovers less, he is not allowed his costs, but at the discretion of the court may be adjudged to pay costs."

While the court in that case denied the right of the plaintiff to join in his action, defendants claiming separate tracts by independent titles, the case was one merely in ejectment, and did not involve the issue of boundary, or the case of an ejection of plaintiff by defendants from the peaceable possession of a fenced enclosure.

In Lanning vs. Dolph et al., Fed. Cas. No. 8073, the plaintiff failed to allege the value of the land sued for, and the case was dismissed on a plea to the jurisdiction, but the plaintiff was allowed to reinstate, notwithstanding the defendant Dolph offered to prove by affidavits that the value of the land in his possession was less than $500. Mr. Justice Washington seemed, however, to be in some doubt as to whether the land in defendant's possession, or that claimed by plaintiff, was the matter in dispute.

In May vs. Clay, 140 Fed., 355, the defendant claimed only about 45 acres of the land sued for, made his separate defense and plea to the jurisdiction of the court, and it was

agreed that the land described in his plea was of less value than $2,000. Upon motion to strike out the plea to the jurisdiction Judge Keller granted the same, saying:

"If I own 1,000 acres of land and find another in possession of and claiming 100 acres therein, the possession of this 100 acres is as to me, a disturbance of my possession of my 1,000 acres. I have no 100-acre tract possessing a value as 100 acres, but I have 1,000 acres, the value of which may be impaired to me by the unlawful possession of the 100 acres, part thereof by the defendant, and my loss of the 100 acres might and often would affect the free use and enjoyment of the entire remainder of my land. So that the 100 acres, which might seem to the defendant the matter in dispute, would, in the eyes of the plaintiff, not be the matter in dispute * * * and the matter in dispute, from the standpoint of the plaintiff, would be his right to the undisturbed possession of his 1,000-acre tract."

Where a defendant disclaims, plaintiff may show that defendant was in possession of the land when the suit was brought and that damages sustained by plaintiff, and therefore recover the land with damages and costs. (Dykes vs. Miller, 24 Tex., 422; Wooters vs. Hall, 67 Tex., 513; Capt. vs. Stubbs, 68 Tex., 225; Tate vs. Wyatt, 77 Tex., 412.)

Jurisdiction should, in any event, have been retained over the controversy so far as plaintiff and the defendants Smith and Greer are concerned.

Smith and Greer had the use in common of all the land of which plaintiff had been dispossessed till about March, 1903, when Greer put a fence through the enclosure, but even then he left in the general enclosure eighty acres of the land claimed by him for which Smith promised to pay him rent. (Rec., p. 43.)

Now here there is no pretense that plaintiff knew how much of the land each defendant had taken possession of. It is true that one witness (Massie) testified that he had informed plaintiff's attorneys about how much each defendant *claimed* (Rec., p. 46), but there is no evidence that witness knew or had ever informed plaintiff's attorneys as

to how or by whom of the respective defendants the land was fenced and appropriated. (Rec., p. 47.) The fact is manifest that Greer, in fencing off that part of the land in plaintiff's enclosure claimed by him, failed to run on the line as claimed by him, so that, by mistake or otherwise, he left eighty acres in Smith's enclosure. Clearly as to this Smith and Greer were properly joined—one as landlord, the other as tenant. The Revised Statutes of Texas (1895), Art. 5255, provides:

"The plaintiff may join as a defendant, with the person in possession, any other person, who as *landlord*, remainderman, reversioner or otherwise may claim title to the premises or any part thereof adversely to the plaintiff."

Recognizing that line of cases of the courts of the United States which hold that where the defendants severally claim separate parcels of land, each of which, with the damages and rents added, does not exceed the value of $2,000, that the value of the various tracts cannot be aggregated to give the court jurisdiction, we respectfully submit that none of them are applicable to the case at bar, because we find here a plaintiff whose land greatly exceeded the value of $2,000, and who, while in possession, through his tenants, of his fenced enclosure, embracing one compact whole, was forcibly dispossessed by the defendants. They are as to him joint trespassers, especially is this true as to Smith and Greer, because Smith held the 720 acres of greater value than $2,000, partly for himself, partly as tenant for Greer and partly as a naked trespasser. (Rec., p. 44.)

Besides, what evidence was there that substantial damages could not be recovered? The defendants Smith, Greer and Reagan had taken down plaintiff's fence and had moved it away and placed it on other lines, and had taken and had the exclusive use of the whole tract—though each claimed a specific part only of the land. It is significant, too, that Smith and Greer, while moving plaintiff's fence, did not move it on the line which they claimed separated their surveys from those of plaintiff, but left all of the land in their enclosures.

The case of Barry vs. Edmunds, 116 U. S., 550, 29 L., 732, is much in point. There the Circuit Court held that

the amount of taxes due the State of Virginia was less than $100, and the property levied upon was of less value than $200, and the Circuit Court, therefore, held that the amount in dispute was less than $500 and that the court had no jurisdiction.

Your Honors held that the order dismissing that case was reviewable by this Honorable Court, and upon consideration of the case, held that where there was a wilful and malicious trespass, the amount of damages laid in the declaration must furnish the test of the jurisdiction, and therefore reversed the judgment of dismissal, citing with approval the rule laid down in Kolb vs. Bankhead, 12 Tex., 228, to the effect that in a case of cutting down and carrying away timber where the defendant wilfully or negligently cut over his own line, the plaintiff would not necessarily be confined to the value of the property taken, but the jury "could give such damages as the facts were deemed by them to warrant, and as would in their judgment be adequate, not only for compensation, but also for prevention." The case of Barry vs. Edmunds is decisive, too, because it illustrates that in cases of trespass, where damages exceeding $2,000 are claimed, the jurisdiction of the Circuit Court cannot be defeated merely because the property sued for is not of value sufficient to give jurisdiction. The case is rich in citations of authorities supporting the rule.

Black vs. Jackson, 177 U. S., 355, 44 L., 805, seems to support our contention that the value of the entire 720 acres in Smith's possession as well as the value of the rents and damages must be taken into account in determining the question of jurisdiction.

Value of the "matter in dispute" must be determined by the value at the time of the judgment.

It has been held by this court that its appellate jurisdiction in action upon contracts "must be determined by the amount in controversy, including interest at the date of the decree." (Keller vs. Ashford, 133 U. S., 610, 33 L., 670.)

In Mass. Benefit Ass'n. vs. Miles, 137 U. S., 689, 34 L., 835, on motion to dismiss for want of jurisdiction this court said, "Where interest antecedent to the judgment appealed

from is included in such judgment and the amount with added interest exceeds $2,000, jurisdiction will attach."

In Knapp vs. Banks, 2 How., 74, 11 L., 184, Mr. Justice Story said:

"The amount in controversy is to be decided by the sum in controversy *at the time of the judgment* and not by any subsequent additions thereto, such as interest. * * * "

An amendment may set up a new cause of action, and if the amount in dispute at the time it was filed exceeds $2,000, jurisdiction attaches.

Plaintiff filed an amended petition on February 21st, 1905, wherein it was alleged that the land sued for was of the value of $5,000 at that time. (Rec., p. 23.) Both witnesses Massie and Bartley, testified that the land sued for was of the value of $4.00 per acre at that date (Rec., pp. 45, 46), so that even if we deduct from the 720 acres of the land sued for in Smith's possession, the 160 acres which he said he did not claim, it would still leave 560 acres, of the value of $2,240, on February 21st, 1905, besides rents, $270, and damages to be recovered against Smith, and Greer his landlord, as to part of the land. (Rec., pp. 44, 45 and 46.)

The Circuit Court held that he would not take into consideration "the value of the land at the time plaintiff's first amended petition was filed or at the time the same was tried on defendants' pleas to the jurisdiction, with rental values of the lands up to that time as claimed by Smith, *but would confine himself* to the value of the lands and the rental values thereof as claimed by Smith as the values existed at the time of the institution of the suit." (Rec., p. 47.)

As we understand the authorities, this holding was clearly erroneous.

In Washer vs. Bullett County, 110 U. S., 558, 28 L., 249, plaintiff, in his original petition, sued to recover $3,184.35. By the amended petition afterwards filed it was averred that the sum of $5,325.14 was due the plaintiff. A motion was made to dismiss the appeal in the Supreme Court because there was no jurisdiction. The court denying the motion, said in part, "When a petition is amended by leave

of the court the cause proceeds on the amended petition. It was upon the amended petition that the judgment of the court below was given, and the question brought here by this writ of error is the sufficiency of the amended petition. *If its averrments show that this court has jurisdiction the jurisdiction will be maintained without regard to the original petition.*" See also Jackson vs. Ashton, 10 Pet., 480.

In Pac. Ry. Co. vs. Ketcham, 101 U. S., 289, 25 L., 936, it was held not material to enquire when the Circuit Court first acquired jurisdiction. It was sufficient if jurisdiction existed when the decree was rendered.

The case of First National Bank vs. Bedford Tr. Co., Fed., 572, was one decided by the Circuit Court of Appeals of the Sixth Circuit.

It involved among other questions that of jurisdiction. The court, composed of Justices Taft and Lurton, speaking through Circuit Judge Lurton, said:

"The jurisdiction of the court seems never to have been brought to the notice of the court below until after an amended and supplemental bill had been filed by the complainant and the cause about ready for hearing. In considering this question of jurisdiction we shall therefore consider the status of the case as it appears upon both the original and amended bills. If the court had jurisdiction at the time a motion was first made to dismiss for want of jurisdiction, *and had jurisdiction when it entered the decrees appealed from*, it is of no moment on this record how long it had jurisdiction or at what prior stage of the cause it was acquired."

Art. 1188 of the Revised Statutes of Texas reads:

"All parties to a suit may in vacation amend their pleadings may file suggestions of death and make representative parties and make new parties * * * provided that it shall be the duty of the party filing such pleading to notify the opposite parties or their attorneys within five days from the filing of the same. All amendments to pleading, pleas and pleas of intervention must, when court is in session, be filed under the leave of court, etc." * * *

It has been well settled in Texas that the original peti-

tion in an action of trespass to try title is amendable and that the plaintiff may set up rights acquired by him since the suit was instituted. An amendment supersedes the original pleading and the cause is tried on the amended pleading as a new suit. (Collins vs. Ballew, 72 Tex., 330; Ballard vs. Carmichael, 83 Tex., 359; Sensheimer vs. Kahn, 24 S. W., 535; Schmidt vs. Huff, 28 S. W., 1055.)

In Schmidt vs. Huff, 28 S. W., 1053, the court held that plaintiff, by amendment, might set up a title acquired by him since the suit was filed, but if he recovered upon that title alone he might be subjected to the payment of the costs.

In the light of the foregoing authorities can there be a substantial doubt that if the matter in dispute by reason of increase in value of the land sued for, after the action was begun, the land and rents and damages in possession of anyone defendant were of greater value than before the plaintiff's amendment was filed, that the jurisdiction thereby attached whether it existed before that time or not?

We respectfully submit:

(1) That the court had jurisdiction of the case as between the plaintiff and all of the defendants as they were suable as joint trespassers. * * *

(2) That the want of jurisdiction was not made to clearly appear by the evidence.

The case of Wetmore vs. Rymer, 169 U. S., 115, 42 L., 682, is quite like the case at bar. There the Circuit Court had dismissed for want of jurisdictional value, finding from the evidence that the matter in dispute, to-wit: the land in defendant's possession did not exceed in value $2,000. This court reviewed the evidence and held that a lack of value had not been clearly proven. An inspection of that case will show that there was some evidence to support the judgment of dismissal, while on the other hand, as in this case, there was much evidence to the contrary. This court reversed the judgment, saying:

"A suit cannot properly be dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record

create a legal certainty of that conclusion." This language has been reaffirmed in the subsequent cases of Waterworks vs. Ryan, 181 U. S., 409, 45 L. 937, and Stezlider vs. McGusten, 198 U. S., 140, 49 L., 986.

This court in the Wetmore vs. Reimers case recognizes the fact that there is no question about which men differ more widely than that of the value of land.

In Butters vs. Carney, 127 Fed., 623, it was held that the burden was upon defendant to show that the matter in dispute did not exceed $2,000, and this is consistent with the statute and cases of this court which hold that the lack of jurisdiction should be shown to the "satisfaction" of the court.

In Herbert vs. Ramey, 54 Fed., 248, the fact that the allegations of value within the jurisdiction in the bill were not beyond what the plaintiff could reasonably hope to establish was held sufficient to support the court's jurisdiction.

We respectfully submit that the order of the Circuit Court dismissing the case for want of jurisdiction should be in all things reversed and remanded to this court for a proper trial on the merits, and we so pray this Honorable Court.

.....David T. Bowers
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Attorneys for Plaintiff in Error.

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No. 138.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

J. T. SMITHERS, *Plaintiff in Error,*

vs.

T. SMITH, Et Al., *Defendants in Error.*

Brief of Defendants in Error.

By THEODORE MACK,
SAM J. HUNTER,
RAY HUNTER,
Co-Counsel with Mack.

KEYSTONE PTG. CO., FORT WORTH.

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To the Honorable, the Supreme Court of the United States:

Plaintiff in error endeavors to sustain the jurisdiction of the Circuit Court by alleging that the defendants in error were joint trespassers upon the 1280-acre tract of land, and hold the same in common, and he sues to establish the boundaries of and to recover it, alleging that the matter in dispute exceeds in value $2000.00.

The defendants in error pleaded to the jurisdiction of the Circuit Court, each answering separately and denying that he was a joint tresspasser with the others, and denying that he holds title in common with the others either as joint tenant or tenant in common, and averring that the allegations of plaintiff to that effect were falsely and fraudulently made for the pur-

pose of conferring jurisdiction upon the Circuit Court; that the plaintiff in error well knew that the statements were false and untrue when they were made.

Each defendant in error describes by metes and bounds the land claimed by him and shows that each claim is a separate and distinct title from all the others; each deraigned his title directly from the State of Texas, and that there is no community of title among them, nor of the possession and they committed no joint trespass.

The pleas show that Lee only had 96 acres of the land claimed by the plaintiff in error; that Greer only claimed 187 acres; Reagan only clamed 288 acres and Smith only claimed 443 acres. Each pleading that the amount claimed and the lines to which they claimed were well known to the plaintiff in error and to his attorneys at the time the suit was brought, and that the allegations of joint trespass and of community title, and of the community of possession were falsely and fraudulently made to confer jurisdiction on the Circuit Court.

There is no necessity for this Court to consider the value of any of the lands except those claimed by T. Smith—443 acres, as the value of each of the others fell far short of reaching the sum of $2000.00. The testimony of the witnesses show that this 443 acres was worth from $2.50 to $3.25 per acre, at the time this suit was filed on September 9, 1903. Only two witnesses place it above $3.25 per acre and those are Bartley and Massey, plaintiff's witnesses, who say that they are and have been agents of the plaintiff in error and they fixed that valuation of $4.00 per acre as its value in February, 1905, stating at the same time that it was worth $3.00 per acre when this suit was brought in September, 1903. Several disinterested witnesses besides the defendants in error, testified that the land in controversy was only worth from $2.50 to $3.00 per acre at the time this suit was brought in September, 1903. Both of plaintiff in error's witnesses, Massey and Bartley, admit that they knew the amount of land claimed by each defendant in error, and approximately the boundaries thereof, and that they knew each claimed no interest in the lands of the other defendants; and Massey, the plaintiff's agent, says he told the plaintiff's attorneys, before the institution of this suit, about how much of the land was claimed by each of the

defendants and approximately where the lines of each run, as claimed by each defendant. Which evidence establishes, as we contend, that the allegations of amount and of value and of joint trespass and of community of title and of possession were falsely and fraudulently made in order to confer jurisdiction on the Circuit Court, and so the District Judge, who tried this case, concluded from said evidence.

Mr. Mickey, a local postmaster in Floyd County, a disinterested witness, testified that, the land claimed by T. Smith was worth about $3.25 per acre, and all the other lands claimed by plaintiff was of about the same value. The value fixed by him relates to the time of the trial. The proof shows that the 60 acres of improved land within Smith's enclosure, which he had held for three years, were worth $1.50 rental per acre per annum and the unimproved grazing land was worth from two to three cents per acre per annum.

This testimony gives results as follows:

443 acres at $3.25 per acre	$1439.00
60 acres at $1.50 per acre rental per annum	270.00
383 acres (grazing land) at 5 cents per acre per annum	57.45
1 mile of fence, but still on the land	60.00
Total	$1826.45

Plaintiff in error made no effort to prove any other damages. But put this land at $3.50 per acre and the total value then would be only $1937.95.

The able counsel for the plaintiff in error in their brief base their rights to recover and to fix the values on the day they filed what purports to be their "First Amended Original Petition," filed February 21, 1905. But this purported pleading has no standing in Court, because it was filed out of term time, and no notice given to defendants in error, and no leave of Court obtained afterwards.

Plaintiff in error on page 21 of his counsel's brief states this proposition: "An amendment may set up a new cause of action, and if the amount in dispute at the time it was filed exceeds $2000.00 jurisdiction attaches." Article 1188 of the

Revised Statutes of Texas is quoted in plaintiff in error's brief on page 22. According to the provisions of that article it was necessary to give the opposite party or their attorneys notice of the filing of that amended pleading within five days after the filing of the same. The term of the Circuit Court at Fort Worth began on the 13th day of March, 1905. This so-called pleading was filed February 21, 1905. No notice was ever given of the filing of this pleading as required by the statute, and no leave granted in open Court to file same, and hence the Court had a right to disregard said purported pleading. With this pleading out, there is nothing to support the evidence offered by the two witnesses of plaintiff in error that the land was worth $4.00 per acre in February, 1905. So the case stands as if no amended petition had been filed and the value of the matter in dispute at the time of the filing of the petition is the criterion upon which to determine the jurisdiction of the Court.

The eleventh paragraph of the bill of exceptions shows that the Court refused to consider the value of the land at the time plaintiff's amended petition was filed. It was his duty to do so, as the amended petition had not been legally and properly filed under the statute of Texas and had no standing as a pleading in the case.

In the trial Court the question of jurisdiction, so far as the sum or value of the matter in dispute is concerned, must be determined by that sum or value existing at the time the suit was filed; but, in appeals from the Circuit Court to an Appellate Court the sum or value of the matter in dispute is determinable by the amount of judgment rendered. This latter criterion cannot be applied to determine the jurisdiction of the trial Court.

In conclusion of this brief we submit the following propositions and authorities on the jurisdiction of the Circuit Court:

The presumption is that a cause is without its jurisdiction unless the contrary affirmatively appears.

Grace vs. Ins. Co., 109 U. S., 278.
People vs. Fordyce, 119 U. S., 469.
Turner vs. Bank, 4 Dallas, 8.
Livingston vs. Van Ingen, 1 Paine, 45.

FEDERAL CASES NO. 8420.

Nashville & St. Louis Ry. Co. vs. Taylor, 86 Fed. Rep., 168.

SUITS AGAINST SEVERAL DEFENDANTS.

"Distinct demands can not be united in one suit by a plaintiff against several defendants in order to give the Court jurisdiction."

1 Desty 374. Walter vs. Northeastern Ry. Co., 147 U. S., 370.
Fishback vs. Western Union, 161 U. S., 96.
Bank vs. Cannon, 164 U. S., 319.
Busy vs. Smith, 67 Fed. Rep., 13.

"If several persons have a common undivided interest, although separable as between themselves, the amount of their joint interest is the test of their jurisdiction. But this is not true where the claims are in their nature separate."

Holt vs. Bergevin, 60 Fed. Rep., 1.
Walter vs. Northeastern Ry. Co., 147 U. S., 370.
Putney vs. Whitmire, 66 Fed. Rep., 385.

"Where shareholders are individually liable for the debts of a corporation, the claims of creditors against shareholders are several and can not be joined to make up the required amount."

1 Desty, 375.
Auer vs. Lombard, 33 U. S. App., 438; s. c. 72 Fed. Rep., 209.

"In an action by the taxpayers to restrain the issue of municipal bonds, the amount of taxes which plaintiff would have to pay, and not the entire issue, would be the test of jurisdiction of amount."

1 Desty, 375.
Colvin vs. Jacksonville, 158 U. S., 456.

"An allegation of the amount of taxes to be collected in different counties can not be made for the purpose of obtaining the jurisdictional amount of $2000.00."

1 Desty, 376.

Fishback vs. Western Union, 161 U. S., 96.
Bank vs. Cannon, 164 U. S., 319.

"When one sues for an amount which exceeds $2000.00, but at the trial his own evidence shows that he actually claims less than $2000.00, the Court is without jurisdiction."

1 Desty, 377.
Cabot vs. McMaster, 61 Fed. Rep., 129.
United States vs. Poe, 61 Fed. Rep., 475.
Horst vs. Merkely, 59 Fed. Rep., 502.
Holden vs. Utah, 82 Fed. Rep., 209.

"The Court does not acquire jurisdiction where the amount claimed is not claimed in good faith."

Bank vs. Bradley, 36 U. S. App., 519; s. c. 72 Fed. Rep., 67.
Am. Wringer Co. vs. Ionia, 76 Fed. Rep., 6.

"All doubts as to jurisdiction must be resolved against the Court's jurisdiction."

Ry. Co. vs. State Board of Assessors, 132 Fed. Rep., 629.
McDaniel vs. Taylor, 123 Fed. Rep., 338.

"When defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance."

Tex. R. S., 5269.

"Upon defendants filing disclaimer the Court may render judgment for the land disclaimed."

Burk vs. Mangham, 37 S. W., 459.

"Matter in Dispute." Something upon which the Court must hear evidence.

18 Stat. U. S., 472, part 3.
Stilwell vs. Williamston, 80 Fed. Rep., 69.
Bouman vs. Ry. Co., 115 U. S., 611.
Kabot vs. McMaster, 61 Fed. Rep., 129, especially 130 and 131, down to bottom of page 131.

On disclaimer leaving Court without jurisdiction, see Cooper vs. Preston, 105 Fed. Rep., 403.

Stemmler vs. McNeal, 102 Fed. Rep., 660.
Herring vs. Swayne, 84 Tex., 525.
Wooters vs. Hall, 67 Tex., 515.

The judgment in this case contains the following as to the pleas filed by the defendants to the jurisdiction of the Court: "And the Court finds from the evidence that the said pleas of each of the said defendants, Reagan, Lee, Smith and Greer, are fully proved and sustained and that this Court has no jurisdiction over the subject matter in dispute, as pleaded and set forth in the plaintiff's petition and in the several pleas of the said defendants." Thereupon follows the order of dismissal.

The Court shows by reference to the plaintiff's petition that he did not recognize the first amended original petition as a pleading in the cause. If the pleas of the several defendants were found to be true by the Court, then, the Court found to be true (and that, too, upon sufficient evidence) that the allegations in the petition seeking to confer jurisdiction on the Circuit Court was fraudulently made, and this deprived the Circuit Court of the jurisdiction regardless of the sum or value in dispute as alleged in the plaintiff's petition.

Believing that the Circuit Court decided the question of jurisdiction properly and that no error was committed, or shown by the record in this case, we respectfully ask that its judgment of dismissal for want of jurisdiction be affirmed.

Respectfully submitted,

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Attorneys for Defendants in Error.

Fort Worth, Texas.

Supreme Court of the United States.

No. 138.—October Term, 1906.

J. T. Smithers, Plaintiff in Error, vs. T. Smith, S. A. Greer, R. C. Reagan et al. } In error to the Circuit Court of the United States for the Northern District of Texas.

[February 25, 1907.]

The plaintiff in error, a citizen of New York, brought in the Circuit Court for the Northern District of Texas a petition to try the title to 1,280 acres of land, against ten defendants, citizens either of Texas, Kentucky or Illinois. Six of the defendants were warrantors of the plaintiff's title, and questions arising as to them are not material here. The petition alleged that upon January 15, 1902, "the defendants Reagan, Smith, Greer and Deven unlawfully entered upon said premises and dispossessed plaintiff thereof, and have since that date unlawfully withheld from the plaintiff the possession thereof, to his damage $2,000.00;" that the plaintiff's title was derived by mesne conveyances from two patents of adjoining lots of land, known respectively as survey 27 and survey 91; that prior to plaintiff's acquisition of title the two surveys were circumscribed by a fence two miles long and one mile wide, making a single tract of land of those dimensions; that the value of the land was $5,000, and that the defendants have destroyed fences and other improvements and thereby damaged the plaintiff in the sum of $2,000; and prayed possession of the land, and damages.

The answer of Reagan alleged that he was the owner of part of the land described in the petition by a title separate and independent from the other defendants; that his land is enclosed by a fence and in his possession; that he disclaims title to the remainder of the land claimed; that the allegation in the petition that he entered upon any other than his own land was untrue, "and made with the intent to confer upon this court jurisdiction over him;" that the value of the land which he entered, is in possession of and claims is less than $800, and asked that the suit abate as to him.

Treating the foregoing answer as a plea in abatement, Reagan, without waiving it, further answered, disclaiming as to part of the land claimed in the petition and pleading the general issue as to the remainder.

The answer of Greer was substantially the same, except that the value of the land upon which he entered and was possessed of was alleged to be less than $600. Greer further answered, alleging the pendency in the courts of the State of an action "to try title to recover of S. A. Greer, a defendant in the case at bar, one T. Smith and others, the title and possession of the land described in the petition in the case at bar," and praying that the cause await the determination of the cause in the State court. The answer of Smith contained the same allegation with regard to the pendency of the action in the State court as that of Greer, disclaimed as to part of the land described in the petition and pleaded the general issue as to the remainder. Deven filed no answer.

More than a year after the last of the foregoing pleadings were filed the plaintiff filed what was entitled "First amended original petition." In it Lee, also a resident of Texas, was named as an additional defendant. The amendment seems to be substantially like the original petition, except that it alleged that "the defendants Reagan, Smith, Greer, Lee and Deven together unlawfully entered upon said premises and dispossessed plaintiff thereof," and that "all of said defendants have jointly taken possession of plaintiff's said land;" that the plaintiff has acquired title to land by the statute of limitations, and that the action is one to fix and determine the boundaries, which are uncertain, and that "the entire land is the subject matter of this controversy as between the plaintiff and each and all of said defendants."

Subsequently Lee answered, alleging that he was the owner of part of the land described in plaintiff's petition by a title separate and independent from that of the other defendants, and with respect to that he pleads the general issue, and disclaims as to the remainder. The answer also alleged that the matter in controversy did not exceed the sum of $2,000, and that "the claim of plaintiff as set forth in his petition as to the value of said land, improvements, rents and damages, exceeding $2,000, has been fraudulently alleged with the intent and purpose to confer jurisdiction upon this honorable court, when in truth and in fact no such jurisdiction existed, because the matter in controversy is of less than $2,000 in value."

Subsequently Smith amended his answer and alleged that he was the owner and in possession of 443 acres of the land described in plaintiff's petition, which was of the value of $1,500, and disclaimed as to the remainder. He also alleged that the valuation placed by the plaintiff on the land, and the plaintiff's allegation that "he and S. A. Greer jointly took possession of said lands," was "fraudulently claimed and alleged for the intent and purpose of conferring jurisdiction upon this honorable court, when in truth and in fact no such jurisdiction existed, because the

whole matter in controversy is and was of less value than $2,000." He further alleged that the controversy had been adjudicated in the State court. The pleas to the jurisdiction were, on motion of the defendants, tried by the judge, jury being waived, who found that "the pleas of each of the said defendants Reagan, Lee, Smith and Greer is fully proved and sustained, and that this court has no jurisdiction over the subject matter in dispute," and dismissed the action for want of jurisdiction. A writ of error was allowed "solely upon the question of jurisdiction," the judge certifying that no other question was tried, transmitted the record containing a bill of exceptions to this court.

The bill of exceptions shows that it was agreed that the plaintiff owned the two surveys, 91 and 27, containing 1,280 acres, of a value much exceeding $2,000; that Lee owned section 32, Reagan section 31, Smith section 28, and Greer section 90, all of which were adjoining sections and surrounded three sides of the plaintiff's land. The dispute concerned the situation of the boundaries. As the defendants claimed the boundaries, they owned 1,014 acres of what the plaintiff claimed to be his land, which when he acquired it was enclosed by a fence in one parcel of 1,280 acres. Of the 1,014 acres taken from the land claimed by plaintiff, Lee claimed 96, Reagan 288, Smith 443 and Greer 187. The evidence which is reported in full in the bill of exceptions shows the following facts: In 1892, before any of the defendants appeared claiming title, the 1,280 acres claimed by the plaintiff was enclosed as one parcel by a substantial fence, and was known as the Pendleton pasture. Subsequently the plaintiff acquired title to the enclosed land. Smith pulled down part and Reagan another part of the Pendleton pasture fence, and Smith and Greer each pastured their cattle throughout the Pendleton pasture.

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the Court.

The plaintiff in error brought an action in the Circuit Court for the recovery of certain land and damages for the detention thereof, basing jurisdiction upon a diversity of citizenship, which was undisputed. In such case it is essential to the jurisdiction of the Circuit Court that "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars." Act of March 3, 1875; c. 137, s. 1, 18 Stat. 470. Amended act of August 13, 1888; c. 866, s. 1, 25 Stat. 434. The action was dismissed by the authority given by section 5 of the act of March 3, 1875, in which it is provided that "if in any suit commenced in a Circuit Court . . . it shall appear to the said Circuit Court, at any time after such suit has been brought . . . that such suit does not really and substantially involve a dispute or controversy properly within

the jurisdiction of said Circuit Court, or that the parties to such suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable . . . under this act," the court shall dismiss the suit. The propriety of the dismissal is brought here for review by virtue of section 5 of the act of March 3, ~~1801~~ 1891, and is the only question for decision.

The plaintiff was the owner in fee simple of a quadrangular lot of land two miles long and one mile wide, containing 1,280 acres, enclosed by a fence, and known as the Pendleton pastnre. Its value largely exceeded two thousand dollars. He sought to recover possession of this land and damages from the defendants Reagan, Smith, Greer, Deven and Lee, who, as he claimed, had disseized him of the land, and were unlawfully holding possession. In ascertaining the precise nature of the plaintiff's claim we take into account not only the original petition, but that pleading entitled "First amended original petition," although it is urged that it does not appear that the amendment was allowed by the court. It is not clear that the amendment adds anything, material to the question presented here, to the original petition, but, however that may be, as it is certified to be a part of the record and was answered by one of the defendants, we assume that it was properly allowed, and was not a mere casual intruder among the papers in the case. The plaintiff alleged in substance in the original and more specifically in the amended petition that the defendants had jointly entered upon, taken and held possession of his land, which was of the value of $5,000, and inflicted damages of $2,000 upon him by the unlawful entry and possession, and sought to recover of all the defendants the whole parcel of land and all the damages claimed. Thus the plaintiff set forth a case within the jurisdiction of the court. Giving to the defendants' answers the broadest possible effect, they each, for the purpose of disputing the jurisdiction of the court, denied that they had jointly entered upon plaintiff's land, and, each disclaiming as to the remainder, alleged that, under a title separate and independent from the other defendants, he had entered upon and held possession of only a certain part of the plaintiff's land, which together with the damages inflicted by the entry and possession was of much less value than $2,000. The answers further alleged that the allegations of the value of the land, the extent of the damages and the joint action of the defendants in entering, taking and holding possession were fraudulently made by the plaintiff with the intent and purpose of conferring jurisdiction upon the court, when in truth no such jurisdiction existed, because the matter in controversy was in reality less than the value of $2,000. Upon the motion of the defendants the judge, without a jury, passed upon the question of jurisdiction, and, after hearing evidence, found that the pleas of the defendants as to the jurisdiction were "fully proved and sustained," and that the court has no jurisdiction over the subject matter in dispute, and dismissed the suit.

The order of the court is subject to review in this court in respect of the rulings of law and findings of fact upon the evidence. *Wetmore* v. *Rymer*, 169 U. S. 115.

The absence of any opinion in the court below, and of any finding of fact except by reference to the several answers of the defendants, which are said to be "fully proved and sustained," and of any more specific recital in the judgment than that the suit was dismissed for want of jurisdiction, renders it somewhat difficult to understand the facts and reasons which led to the dismissal. But upon an examination of the whole record it seems clear that the court found:

(1) That the defendants did not jointly take and hold the plaintiff's land;

(2) That each defendant, acting independently of the others, took and held only a part of plaintiff's land, and that each part thus taken and held by each defendant was of less value than $2,000; and

(3) That the plaintiff in his petition had fraudulently stated the value of his land, the extent of his damages and the joint character of defendant's action in entering and taking possession of his land, and had done this for the purpose of conferring jurisdiction upon the court.

If the last finding of fact was warranted by the evidence there is no need of going further, because such a state of facts would demand a dismissal of the action. Ordinarily the plaintiff's claim with respect to the value of the property taken from him or the amount of damages incurred by him through the defendants' wrongful act measures for jurisdictional purposes the value of the matter in controversy, *Smith* v. *Greenhow*, 109 U. S. 669; *Barry* v. *Edmunds*, 116 U. S. 550; *Scott* v. *Donald*, 165 U. S. 58; *Wiley* v. *Sinkler*, 179 U. S. 58; unless, upon inspection of the plaintiff's declaration, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount. *Lee* v. *Watson*, 1 Wall. 337; *Schacker* v. *Hartford Fire Ins. Co.*, 93 U. S. 241; *Vance* v *Vandercook Company*, 170 U. S. 468; *North American Company* v. *Morrison*, 178 U. S. 262. The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the declaration shows that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount. *Schunk* v. *Moline Co.*, 147 U. S. 500. In the last case the plaintiff's petition prayed judgment on several promissory notes, of which some, amounting to $530, were due, and others, amounting to $1,664, were not due, the jurisdictional amount then, as now, being $2,000. In holding that the court had jurisdiction of the claim this court, by Mr. Justice Brewer, said:

"Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a non-negotiable note for $2,500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the Circuit Court would have jurisdiction? There would be presented a claim to recover the $2,500; and whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court."

Nevertheless however stringent and far reaching the rule may be that it is the plaintiff's statement of his case which governs in determining the jurisdiction, it does not exclude the power of the court to protect itself against fraud. This was pointed out in *Smith* v. *Greenhow, ub. sup.*, where it was said that, if the court found as a fact that the damages were laid in the declaration colorably and beyond a reasonable expectation of recovery for the purpose of creating jurisdiction, there would be authority for dismissing the case, and, following this statement of the law, it was held that where the judge of the Circuit Court, upon sufficient evidence, found that the damages had been claimed and magnified fraudulently beyond the jurisdictional amount, the action should be dismissed. *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540. It follows, therefore, as has been said, that if the third finding of the judge in the court below was warranted, his action in dismissing the case should be affirmed. But after an examination of the evidence we are of the opinion that nothing in it warranted any such finding. It appeared clearly that the Pendleton pasture, which the plaintiff sought to recover against all the defendants, was of a value much in excess of the jurisdictional amount. There was not a word of evidence reflecting upon the plaintiff's good faith in bringing the action, in joining the defendants, or in framing his petition. He doubtless preferred to try his controversy in the Federal courts, and whatever the motive of his preference may have been, he had the right to act upon it. *Blair* v. *Chicago*, 201 U. S. 400; *Chicago* v. *Mills*, decided February 4, this term. Therefore the validity of the order of dismissal must be considered, after an elimination of the finding, that the plaintiff's claim was fraudulently made.

The plaintiff's claim, which we now assume to have been made in good faith, was that the defendants, acting together, took and held from him land of the value of $5,000, and at the same time inflicted damages upon him of $2,000. Upon any possible theory of law this claim states the

plaintiff's side of a controversy, which is unquestionably within the jurisdiction of the Circuit Court. When it is duly put in issue by the defendants' pleadings the record upon its face discloses a controversy between citizens of different States, in which "the matter in dispute exceeds two thousand dollars in value," and, therefore, one which is within the exact words of the act conferring jurisdiction upon that court. It is legally possible for the plaintiff to recover the full amount of all the land and the full amount of the damages claimed. We know of no case that holds that in such a situation the judge of the Circuit Court is authorized to interpose and try a sufficient part of the controversy between the parties to satisfy himself that the plaintiff ought to recover less than the jurisdictional amount, and to conclude, therefore, that the real controversy between the parties is concerning a subject of less than the jurisdictional value, and we think that by sound principle he is forbidden to do so. In exercising the authority to dismiss the action conferred by the act of 1875 the judge may proceed upon motion of the parties or upon his own motion, and, if he chooses, without trial by jury. *Williams* v. *Nottawa*, 104 U. S. 209; *Wetmore* v. *Rymer*, *ub. sup.* Such an authority obviously is not unlimited, and its limits ought to be ascertained and observed, lest under the guise of determining jurisdiction the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury. For it must not be forgotten that where in good faith one has brought into court a cause of action, which, as stated by him, is clearly within its jurisdiction, he has the right try its merits in the manner provided by the Constitution and law, and can not be compelled to submit to a trial of another kind. This was clearly stated by Mr. Justice Matthews in *Barry* v. *Edmunds*, 116 U. S., at page 565, who said: "In no case is it permissible for the court to substitute itself for the jury, and compel a compliance on the part of the latter with its own view of the facts in evidence, as the standard and measure of that justice, which the jury itself is the appointed constitutional tribunal to award." In applying these general principles for the purpose of ascertaining the limits of the authority to dismiss summarily for lack of jurisdiction the circumstance that in this case a jury was waived by the parties is without significance, because if the judge had authority to adopt this summary method he could dispense with the jury, whether the parties agreed to it or not.

The error into which the judge in the court below has fallen is shown by an analysis of his findings. He did not find that the land which the plaintiff claimed to recover was not of a value in excess of $2,000, but that parts of that land, which each defendant claimed that the plaintiff ought only to recover against him, were each of less than the value of $2,000. As the plaintiff alleged and the defendants denied that the defendants

jointly took and held his whole lot of land, the judge, on the conceded value of the plaintiff's land, in order to have arrived at the conclusion that the case should be dismissed, must have found that the defendants had not jointly taken and held the whole of the plaintiff's land. In doing this we think he exceeded his authority under the statute, and in determining the jurisdiction, in effect, decided the controversy between the parties upon the merits. In deciding that the defendants had not acted jointly, as the plaintiff alleged and the defendants denied, he determined not a jurisdictional fact, but an essential element of the merits of the dispute upon which the parties were at issue.

An assumption which underlay the action of the court below in dismissing the case evidently was that if the defendants, as they asserted in their pleadings, had, each, acting by virtue of a separate and independent title, taken and held a part only of the plaintiff's land, each part being less than the jurisdictional amount, although the whole was of more than the jurisdictional amount, there was no controversy within the jurisdiction of the Circuit Court. The correctness of this assumption of law has been argued before us by the parties. We do not deem it necessary to decide that question. There is certainly respectable authority which tends to show that in such a case the plaintiff, being the owner of a single lot of land, may maintain one action against all the defendants and that the measure of jurisdiction is the value of the plaintiff's land, and not the value of the part held by each defendant. The appropriate rule, however, to be applied to the facts of this case can be better determined in a trial on the merits, where instructions on their varied aspects may be given to the jury, subject to the review provided by law.

Because the Circuit Court erred in dismissing the case for want of jurisdiction, its action must be reversed.

The judgment of the court below is therefore reversed and the cause remanded to that court with directions to take such further proceedings therein as the law requires and in conformity with this opinion.

Mr. Justice BREWER dissents.

True copy.

Test:

Clerk Supreme Court, U. S.